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Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

WALL STREET PUBLISHING INSTITUTE, INC.

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

(1) Does the First Amendment to the Federal Constitution permit a Court (as authorized by the June 21 opinion of the Court of Appeals for the District of Columbia Circuit 0/) to enter an injunction ordering a

> "bona fide newspaper, news magazine, or business or financial publication of general and regular circulation" 1/

to print a disclosure that one of its articles was published in a "tie-in arrangement" for revenues received by the publication for advertising or reprint revenues received by it from the subject of the article, regardless of the decision of the publisher of the Magazine who determines its contents as to whether this disclosure should be published?

0/ Hereinafter "the June 21 opinion";
1/ The definition of a publication whose publisher is excluded from registration with the SEC under the Investment Advisers Act (15 U.S.C. 80b-2 (a) (11) (D);

(2) Does the First Amendment to the Federal Constitution permit a Court to enter an injunction (as does the June 21 opinion) ordering the same:

> "bona fide newspaper, news magazine or business or financial publication of general and regular circulation"

to make the disclosure described in (1), above, under threat of contempt to both publication and publisher if it does not?

(3) Does the First Amendment to the Federal Constitution permit a Court to enter the injunction set forth in (2), above, (authorized by the June 21 opinion) permanently suppressing 2/ an entire issue or entire issues of the:

> "bona fide newspaper, news magazine or business or financial publication of general and regular circulation"

2/ See the injunction secured by the SEC in the District Court's order of June 12, 1954, infra p.17, which the SEC sought to have reinstated by the District Court prior to that Court's order of August 6, 1986 dismissing the SEC Complaint; that injunction is authorized by the June 21 opinion.

,suppressing more than 50% of the content of the publication 2A/ which is general news and commentary without mention of a single issuer or security; suppressing as well the overwhelming bulk of the articles describing individual companies against whom no "tie-in agreement" (as described in (1), above) has been alleged, if a Court finds that a single issue or issues of the publication contain an individual article or articles involving a "tie-in agreement?

(4) Does the First Amendment to the Federal Constitution permit a Court to enter an injunction (as does the June 21 opinion) ordering a:

> "bona fide newspaper, news magazine, or business or financial publication of general and regular circulation"

2A/ Petitioner's publication, "Stock Market Magazine", the subject of this litigation (herewith also referred to as "the Magazine");

to be permanently enjoined from publishing and circulating its magazine in interstate commerce or through the mails if the Court finds the publication has entered a "tie-in" arrangement (as described in (1), above) violating Section 17 (b) of the Securities Act of 1933, when that Act provides ample remedies for enforcement of Section 17 (b) without enjoining publication and circulation of any newspaper or magazine?

(5) Is the statutory requirement of Section 17 (b) of the Securities Act of 1933 (15 U.S.C. 77q (b) as it is applied to the publication in this case (viz., Petitioner's Magazine "Stock Market Magazine")?:

> "a command in the same sense as a statute or regulation for bidding" Petitioner "to publish specified matter."

constitutionally proscribed by this Court in Miami Herald v. Tornillo, 418 U.S. 241 at 256?

(6) Is the injunction authorized by the June 21 opinion constitutionally enforceable if the SEC must, in advance of publication of each issue of a financial magazine or newspaper, screen the contents of each article in that publication and concurrently scrutinize the financial books and records for an unknown period prior to each publication to determine whether a "tie-in agreement" is in existence justifying the injunction? Is lesser regulatory activity adequate for the protection of the public interest now that the Court of Appeals has authorized injunctive relief under a statute which has, until now, clear and adequate non-injunctive remedies?

(7) Since the June 21 opinion did not base its grant of authority for the entry of an injunction against Petitioner on any concept of regulating "commercial speech" but rather on a far broader ground, to wit:

> "We believe...that the Government may have the power to regulate Stock Market Magazine, not because the articles are "commercial speech", but rather because of the federal government's broad powers to regulate the securities industry. Where the federal government extensively regulates a field of economic activity, communication of the regulated parties often bears directly on the particular economic objective sought by the Government" 3/

What is the limit of the grant (in the June 21 opinion) of the SEC's ancillary power (deriving from its power to regulate the securities industry) to regulate speech which is otherwise constitutionally protected? Must Petitioner monitor comment on its editorial page (wholly apart from its news articles and features) if that comment influences directly or indirectly one of its advertisers or purchasers of reprints? The ultimate question posed by the rationale of the June 21 opinion (quoted above) is the limit, if any, on the government's power to

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3/ Slip opinion (Appendix at 15a); Appendix citations are designated "App.";

regulate speech (which is otherwise constitutionally protected) of parties subject to economic regulation by the government if this speech:

> "bears directly on the particular economic objective sought by the Government." 4/

4/ Slip opinion (App. 15a)

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Official Reports of Opinions

The decision of the U.S. District Court for the District of Columbia dated June 12, 1984 is found at 591 F. Supp. 1070 (D.D.C., 1984). Neither the decision of the Court of Appeals of the District of Columbia Circuit dated August 10, 1984, 4AA/ nor the decision of the U.S. District Court dated August 1, 1986 dismissing the SEC Complaint are reported. A copy of the August 1, 1986 opinion filed in the Appendix to this Petition. 4A/ The June 21 opinion of the Court of Appeals is reported at 851 F.2d. 365.

This Court's jurisdiction is invoked pursuant to this Court's Rule 17 (c) and Section 2101 (c), Title 28 (U.S.C.). This petition is from an order and opinion of the United States Court of Appeals for the District of Columbia Circuit dated June 21,

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4A/ At App. 31a-41a;
4AA/ Quoted in haec verba, infra, 18;

1988. A timely petition for rehearing of that order was filed with the Court of Appeals by this Petitioner; it was denied by the Court of Appeals on September 14, 1988. 4B/

Constitutional Provisions and Statues Involved

(1) First Amendment to the Federal Constitution:

> "Congress shall make no law...abridging the freedom of speech, or of the press."

(2) Section 17 (b) of the Securities Act of 1933 (15 U.S.C. 77q (b))

> "(b) It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter,or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof."

4B/ App. 24a;

(3) Section 20 (b) of the Securities Act of 1933 (15 U.S.C. 77t(b)):

> "(b) Whenever it shall appear to the Commission that any person is engaged or about to engage is any acts or practices which constitute or will constitute a violation of this subchapter, or of any sale or regulation prescribed under authority thereof 6/... the Commission may transmit such evidence as may be available concerning such acts or practices to the Attorney General who may, in his discretion, institute necessary criminal proceedings under this subchapter."

Statement of the Case

The following facts are undisputed unless otherwise noted.

A. The Magazine: The most important undisputed fact in this case is the magazine published by the Petitioner, Stock Market Magazine. The nature and content of this publication are crucial. The Magazine is vital evidence of those facts. Accordingly, Appellant has selected at random an issue--

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6/ This section also authorizes injunctive relief for security violations;

the August, 1981 issue--the same issue which appeared in the Joint Appendix below and was discussed in the briefs below--and has lodged ten copies of it with the Court for its examination.

1. History of the Magazine: 6A/ The Magazine has been published for more than 27 years, in Yonkers, New York. Its format has not materially changed during that period of open publication and interstate sale. The present published, Angelo Martinelli, bought the publication in 1967. Bernard Brown was editor of the Magazine from 1974 until he retired in 1988. With minor changes the content of the Magazine has remained unchanged throughout its 23 year history. Its circulation has widely fluctuated. In

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6A/ The history of the Magazine is set forth in the affidavit of its publisher, Angelo Martinelli (App. 65a-75a). That affidavit was part of the record on appeal.

earlier periods it reached a total circulation of more than 40,000 copies. Today it has a total circulation of approximately 15,000, of which more than 12,000 are subscribers. The remainder are newstand sales. The Magazine is circulated throughout the country and in Canada. It is published ten times annually; its subscription price is $15.00 per year. Individual issues sell for $1.50.

2. Content of the Magazine: 6B/ Two different kinds of articles appear in the Magazine.

a. One major segment deals with general news and commentary of interest to the business and financial community as a whole. These articles do not deal with or indentify any particular company or security.

6B/ The content of the Magazine is described in the affidavit of its editor, Bernard Brown (App. 42a-64a);

This Petition refers to such articles as "general news and commentary."

Typical among them (as reflected in the August, 1981 issue 6C/) are: "Wall Street Scene" (a description of broad trends in the stock market and how they are affected by national and international economic developments); "Discount Brokers" (a discussion of the advantages and disadvantages of investing through discount brokers); "Estate Planning" (a description of the problems of a small business owner when planning to write a will); "Businessmen's Bulletin" (a monthly article devoted each month to restaurants and hotels that businessmen might find attractive); "Books" (a monthly article containing reviews of recently published business and financial

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6C/ Lodged with the Court for its examination. This issue, along with six other issues chosen at random were all in the record below;

books); "Significant" (a monthly article highlighting individual news items of significant interest in the past month to the business and financial community. In the specimen issue lodged with the Court, the article dealt with the increased volume of NASDAQ sales, the availability of commodity quotations by satellite communication and the appointment of George Schultz to the Board of General Motors); "Careers and Money" (a monthly article describing career opportunities in business and finance; in the specimen issue the subject was "Japanese Management Methods Are Worth Studying."); "Washington: Potomac Undercurrent" (a monthly article written by the editor analyzing political events in Washington and their national and international economic impact.)

In an unrefuted affidavit 6D/ put in the District Court record by the Petitioner,

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6D/ App. 76a-96a;

Timothy Blodgett, Senior Editor, Editorial Operations, of the Harvard Business Review, averred that in a random selection of 16 issues of the Magazine, 50.44% of the column inches of its content was made up of such general news and commentary.

b. "Company" articles make up the remainder of the content of the Magazine. These articles deal with identified corporations, describing their operatiosns and their record and often discuss the securities issued by the company. The "company" articles are the target of the SEC in this litigation.

Brown, the editor of the Magazine for Fourteen years, in his unrefuted affidavit, sets out the steps in which the content of the "company" articles reach publications. 6E/ First, the concept of a "company" article is either Brown's or that of a

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6E/ These steps are found in Brown's affidavit at App. 54a-59a;

public relations firm servicing the corporate world. Second, this concept--if not Brown's--is then transmitted to Brown along with pertinent company data uniformly required by Brown (the company's annual report is required); it may be accompanied by the company's 10-K or 10-Q filing with the SEC or other descriptive material. Third, Brown then decides whether the article is newsworthy under criteria set by Brown alone. Fourth, if Brown's decision is positive, a draft article is prepared, either by Borwn or by the public relations firm whence emanated the concept of the article. Fifth, if the draft is not prepared by Brown it is submitted to Brown for editing. Sixth, Brown next personally corroborates the information in the draft with the financial reports already submitted to him and by personal consultation with corporate officials (the latter occurring, Brown averred, in a

majority of all drafts submitted to him). Seventh, Brown next edits the article both for substantive accuracy and for style. Eighth, the article is then type-set for publication.

Brown, who was the only witness on the subject of the Magazine's editorial practices, further averred that he spends from five to six hours of his time on each article; the overall time span of the eight steps outlined above covers, Brown averred, four to six weeks. 6F/

c. The Magazine holds the copyright to all material printed in the Magazine. As both Brown and publisher Martinelli averred in their affidavits, the decision of a company featured in a "company" article is always made after publication of the article. Both averred that an agreement for purchase of reprints has never been a condition of publication of a "company"

6F/ Brown's affidavit, part of the record below, is at App. 42a-64a; the facts cited above are at App. 58a;

article in the Magazine. 6G/ And, Petitioner submits, the record in the trial court is devoid of any probative evidence that it has.

d. Advertising does appear in the Magazine. Brown, again in an unrefuted affidavit, averred that less than 5% of the companies featured in "company" articles advertise in the Magazine. 6F/ The affidavits of both Brown and Martinelli, again unrefuted, aver that advertising in the Magazine is never a condition of the publication of a "company" article about the advertiser. 6G/

e Throughout the litigation below Brown was the sole full-time employee of the Magazine. Since his retirement a son of the publisher has held the job. The Magazine is printed by Gazette Press, which is also owned by the publisher. The Magazine is a small publication; each issue is approximately one-quarter the size of its

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6G/ App. 59a-71a;
6H/ App/ 60a, 69a;

major competitors in the financial and business press. It is also far from affluent; in four of the six years prior to commencement of this suit by the SEC in 1982, the Magazine lost money.

f. It is undisputed that neither Martinelli, the publisher, nor Brown, the editor, has ever had any interest in the securities of any company featured in a "company" article. There is no "scalping" in this case. 6I/

B. The Financial Press: Very much a fact in this case is that it affects the nation's entire financial press. The June 21 opinion of the Court of Appeals indisputably opens the books and records of every financial magazine and every newspaper that prints financial news to the scrutiny of the SEC. The content of every article in every

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6I/ App. 63a, 72a;

such publication describing an issuer of a security is equally subject to SEC scrutiny for "tie-in agreements" which may result in an injunction against the financial publication's dissemination in interstate commerce or the mails. Every major financial magazine and all newspapers which print significant financial data are sold in the District of Columbia. The June 21 opinion has, therefore, national impact.

Moreover, the segment of the public relations industry serving corporate clients in their relations with the financial press is another entity factually before the Court in this case. That segment of the public relations industry, which bills $200,000,000 6J/ annually (as reflected by affidavits filed below) is part of the far-reaching matrix affected vitally by the June 21 opinion.

6J/ The affidavit of Edward Gottlieb, part of the record below;

1. SEC Complaint

C. History of this action: The SEC commenced its suit on July 20, 1982, after 21 years of publication of the Magazine in the same format. The suit sought an injunction against the Magazine prohibiting it from circulation in interstate commerce or the mails unless (1) Petitioner registered with the SEC as an Investment adviser; (2) Petitioner refrained from violating Rule 206 (promulgated under the Investment Advisers' Act), (3) Petitioner refrained from violations of Section 10 of the Securities & Exchange Act of 1934 and Rule 10b-5 (promulgated thereunder) and (4) unless Petitioner refrained from violating Section 17 (b) of the Securities Act of 1933.

2. Discovery Proceedings

During discovery prior to trial Stock Market Magazine remained entitled to all First Amendment rights accorded any American

publication. Yet, in discovery, the Magazine was forced to turn over to the SEC (1) the identify of its news sources; (2) the identity of the companies that reporters (either from the Magazine or from public relations agencies) had contacted for material to be used in articles in the Magazine; (3) the identify of the individuals within the companies who divulged the information to the reporters; (4) nine different categories of information bearing on how the Magazine conducted its research into material it was to print; (5) the identity of all individuals contacted during preparation by the Magazine of either a "company" article or an article of general news and commentary; (6) all drafts of all feature articles; (7) all reporters' notes on all articles, and (8) the Magazine's subscription list.

Petitioners' resistance to this historic discovery into journalistic practices

(including a denied motion for an interlocutory appeal under Section 1291 of Title 28, U.S.C.) was unavailing. For two days in April of 1983, representatives of the SEC ranged freely over all of the documents at the Magazine's office in Yonkers, scrutinizing draft stories, reporters' notes, interview notes and editorial notes. This same SEC power inexorably follows if the June 21 opinion is left intact by this Court.

3. The Injunction of the District Court of June 12, 1984

Following the filing of cross-motions for summary judgment, the District Court ruled in favor of the SEC on each count of its Complaint on July 12, 1984. 7/ It

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7/ There was no trial in the District Court. Whatever evidence the SEC has in support of its claims of violation of Section 17 (b) came from affidavits or deposition testimony. Petitioner contends that none of it evidences any "tie-in agreement" referred to in the June 21 opinion.

entered a series of injunctions against the Petitioner, each tracing the terms of the applicable statute. The injunction against petitioner under Section 17 (b) of the 1933 Act (which the SEC sought and now seeks to reinstate) read as follows:

> "That Wall Street Publishing Institute, Inc., its officers, directors, agents, servants, attorneys, employees, successors and assigns, and those persons in active concert with them, are permanently restrained and enjoined from making any use of any means of instruments of transportation or communications in interstate commerce or by the use of the mails, publishing, giving publicly to, or circulating any notice, circular, advertisement, newspaper, article, letter, investment service or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received directly or indirectly from, an issuer, underwriter or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof." (emphasis supplied)7A/

4. Stay pending Appeal

On August 2, 1984, Petitioner filed an Emergency Motion for stay pending appeal in

7A/ The injunction of July 12, 1984 of the District Court is at App. 25a-30a; the 17 (b) injunction is at App. 29a-30a;

the Court of Appeals. On August 10, 1984 the Court granted that motion ruling:

> "ORDERED by the Court that the motion is granted. Although we express no firm opinion on whether the Investment Advisers' Act is applicable to appellant, whether appellant's alleged practices violate applicable law, or whether the district court acted properly in ruling on these matters on a motion for summary judgment, we are satisfied that cumulatively the issues cast sufficient doubt on the propriety of the district court's rulings that, coupled with the magnitude of the First Amendment interests at stake the criteria of Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977), are satisfied. This stay, of course, in no way insulates appellant from liability for any violations of the applicable securities laws.

5, Proceedings in this Court in SEC v. Lowe

On October 1, 1984 this Court granted a writ of certiorari in Lowe v. SEC. Since it was clear to both parties that Lowe would be dispositive of many, if not all of the issues in this case, Petitioner did not oppose the SEC's motion (filed on October 3, 1984) to

stay all proceedings in the Court of Appeals until Lowe was decided by this Court.

Lowe was decided by this Court on June 10, 1985. The majority of the Supreme Court held that Congress, when enacting the Investment Advisers' Act of 1940, did not intend to regulate published investment advice where no personal relationship existed between the Investment Adviser and his client. In unmistakeable terms, the majority of the Supreme Court 8/ ruled that:

> (at 472 U.S. 204) "Congress, plainly sensitive to First Amendment concerns, wanted to make clear that it did not seek to regulate the licensing of non-personalized publishing activities."

8/ The minority of the Court disagreed with Justice Stevens' (majority) interpretationof Congressional intent. The minority ruled, however, that the SEC (or any other body) was constitutionaly prohibited from any prior restraint of published, impersonal, investment advice: the majority opinion is found at 472U.S. 181; the concurrence at 472 U.S. 211.

In language relevant to WSPI, the Court further held:

> (at 208) "The mere fact that a publication contains advice and comment about specific securities does not give it the personalized character that identifies a professional investment adviser. Thus, petitioners' publications do not fit within the central purpose of the Act because they do not offer individualized advice attuned to any specific portfolio or to any client's particular needs. On the contrary, they circulate for sale to the public at large in a free, open market--a public forum in which typically anyone may express his views." (emphasis supplied)

Again, in terms directly applicable to WSPI, the Court's majority ruled:

> (at 209) "Moreover, there is no suggestion that they contained any false or misleading information, or that they were designed to tout any security in which petitioners had an interest. Further, petitioners' publications are of "general and regular circulation." Although the publications have not been "regular" in the sense of consistent publication; there is no indication that they have been timed to specific market activity, or to events affecting or having the ability to affect the Securities industry."

These points are equally true of Stock Market

Magazine. On the specific matter of fraud, the Supreme Court said the following:

> (at 210) "The dangers of fraud, deception, or overreaching that motivated the enactment of the statute are present in personalized comunications but are not replicated in publications that are advertised and sold in an open market To the extent that the chart service contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt about the protected character of the communications, a matter that concerned Congress when the exclusion was drafted. (emphasis supplied)

Under this ruling there can be no dispute that 50.44% of Stock Market Magazine's content is constitutionally protected. It is Petitioner's position that this same protection extends to all of the content of its Magazine.

The majority of the Court in Lowe concluded:

> (Ibid) As long as the communications between petitioners and their subscribers remain entirely impersonal and do not develop into the kind of fiduciary, person-to-person relation

> -ships that were discussed at length in the legislative history of the Act and that are characteristic of investment adviser-client relationships, we believe the publications are, at least presumptively, within the exclusion and thus not subject to registration under the Act.

6. Proceedings Immediately following Lowe

On June 25, 1985 WSPI filed a motion in the Court of Appeals seeking summary reversal of the trial court's July 12, 1984 order on the basis of the Supreme Court's ruling in Lowe. On August 26, 1985 this Court denied the motion but acting sua sponte vacated the entirety of the trial court's July 12, 1984 injunction and remanded the cause to Chief Judge Robinson for appropriate action in light of Lowe. WSPI filed a motion to dismiss the SEC complaint in light of Lowe; on its side, the SEC filed a motion to reinstate the trial court's findings and injunctions under Section 10(b) of the 1934 Act, SEC Rule 10b-5 promulgated thereunder and Section 17 (b) of the 1933 Act. The injunction which the SEC sought to reinstate (with regard to Section 10b, Rule 10b-5 and

Section 17 (b)) were all precisely the same as that found in the trial court's order of July 12, quoted (with regard to Section 17 (b)) supra.

During oral argument before Chief Judge Robinson, the SEC contended that the Petitioner was not within the definition of "bona fide publication...", excluded from registration, as affirmed by Lowe. The trial court specifically rejected this argument:

> "Under the law as articulated by the Supreme Court, the record in this case clearly indicates that Stock Market Magazine is a bona fide publication with a general and regular circulation, and that the publisher, Defendant Wall Street Publishing Institute, Inc. is not an investment adviser." (Opinion of Chief Judge Robinson of August 1, 1986, at 3, App. 34a)

After briefing and oral argument Chief Judge Robinson, on August 1, 1986, ordered the SEC Complaint dismissed. Speaking directly to the Section 17 (b) allegations of the SEC, Chief Judge Robinson held:

"The Lowe decision is significant, however, because by designating publications such as Stock Market Magazine as bona fide publications entitled to First Amendment rights, this Court is unable to fashion a civil remedy for the violation. This Court's injunction of July 12, 1986, can no longer withstand constitutional scrutiny under the First Amendment.

Although Plaintiff claims that in seeking injunctions which track the language of the Securities Exchange Act and the Securities Act it is not seeking to enjoin the publicationof Stock Market Magazine, the effect of such an order is clearly a prior restraint which violates the First Amendment. Although the Court's order does not forbid publication entirely, it does place qualifications on publications which, if violated, could lead to punishment for contempt. Plaintiff is correct that any punishment would be imposed on Defendant after the fact of publication, but it is the injunction itself, which threatens this punishment before the fact of publication, which violates the First Amendment. The Supreme Court has stated:

> "Only government allegations and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."

New York Times Co. v. United States, 403

U.S. 713, 726, 727 (1971). The fraud committed by Defendant in this action does not even arguably reach this level of danger. Therefore, the injunctions sought by the SEC would be unconstitutional.

CONCLUSION

This decision clearly does not stand for the proposition that Defendant, as a bona fide publication, can commit fraud at will. The SEC may still bring a criminal action against it under Section 17 (b) if it can show that Defendant's violations were willful. It is only before the fact restraint on free speech that are prohibited by the First Amendment." (App. at 37a-40a)

7. The Appeal and the June 21, 1988 decision of the Court of Appeals

The SEC then appealed. On appeal, the SEC dropped all claims against the Petitioner based on the Investment Advisers' Act and the regulations promulgated thereunder, dropped those based on Section 10 of the 1934 Act and the regulations promulgated under it, retaining solely its claim against the Petitioner based on Section 17 (b) of the

1933 Act. The SEC also made it clear (on page 27 of its brief to that Court) that the injunction that it sought the Court of Appeals to authorize was the same injunction that had been entered against Petitioner on July 12, 1984 (quoted in haec verba, supra, p.), which it sought unsuccessfully to reinstate in District Court.

In factual terms the SEC argued (disputing the trial Court's ruling) that Petitioner was subject to an injunction suppressing dissemination of the entire Magazine if it did not disclose in its pages the consideration paid by any company to an employee of that company (or by a public relations agency to its employee) for the drafting of material that subsequently appeared in a "company" article in the Magazine. The injunction sought by the SEC (suppressing the entire Magazine) also would be entered if there was evidence that the Magazine had entered a "tie-in agreement" for publication of a "company" article in

exchange for the purchase by the featured company of advertising or reprints of the article.

The Court of Appeals first determined in its June 21 decision that neither the SEC nor the Courts had jurisdiction to inquire into the source of content of any article published in any financial publication (such as the Magazine) nor the methods of reporting nor editing such content. The Court did so out of repugnance for:

> "both SEC and Court interference with the "crucial process" of editorial control, interference that the Supreme Court has decried as particularly repugnant to core First Amendment concerns." Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 257-58 (1974) (slip opinion of Court at App. , quotes and citation in the original) 8A/

Notwithstanding that ruling, the Court of Appeals ruled that:

8A/ Obviously Petitioner has no argument with that portion of the Court of Appeals' opinion, found at App. 19a to the last paragraph on App. 22(a) beginning with the words "While Section 17 (b):;

> "the government may have the power to regulate Stock Market Magazine, not because the articles (in it)" are "commercial speech", but rather because of the federal government's broad powers to regulate the security industry." (App.

Clearly expanding the government's authority to regulate speech beyond concepts of "commercial speech" now extant in the law, the Court of Appeals went farther:

> "Where the federal Government extensively regulates a field of economic activity, communication of the regulated parties often bears directly on the particular economic objectives sought by the Government" (Slip opinion, App. 15a)

The Court of Appeals' rationale extending the right of the government to impose restraints on otherwise protected speech to all those areas (extending beyond "commercial speech")

> "where the federal government extensively regulates a field of economic activity."

that is put squarely before this Court by the

Court of Appeals' June 21 decision.

Under the foregoing rationale, the Court of Appeals proceeded to license a prior restraint:

> "Stock Market Magazine's failure to disclose consideration received in return for publication is then in principle, constitutionally proscribable." (Slip opinion, App, 18a)

And the Court determined:

> "There was some evidence in the record that consideration other than free text, including the purchase of advertising space, and orders for reprints, was a quid pro quo (i.e., a tie-in agreement) for publications that the SEC regards as deceptive" (Slip opinion, App. 22a)

and held:

> "If they" (these arrangements) "did exist, we have no doubt that an injunction could be fashioned to require disclosure when consideration is paid in this distinct form, without trammeling fully protected speech or interfering with editorial practices that cannot be separated therefrom" (Slip opinion, App. 22a)

The Court then remanded the cause to the

trial court for findings on this issue. 9/

Petitioner, on August 2, 1988, filed with the Court of Appeals a timely Petition for Rehearing of the June 21 opinion and order and a suggestion that the appeal be heard en banc by that Court. Both were denied by the Court of Appeals on September 14, 1988.

9/ On September 21 and October 17, 1988, Petitioner moved the Court of Appeals to stay issuance of the mandate pending the filing of this Petition within the statutory period provided therefore. On November 2, both motions were denied by that Court. On November 23, Petitioner filed a motion with the Chief Justice seeking the same stay. Following the filing of an Opposition by the Office of the Solicitor General, the Chief Justice denied the motion on November 29, 1988. As of the date of this filing of this Petition, the mandate of the Court of Appeals has not yet issued. Without any commitment as yet from the SEC, negotiations are underway stipulating a stay of proceedings in the District Court (once the mandate of the Court of Appeals issues) pending disposition by this Court of this Petition.

Reasons for Granting of the Writ

Under this Court's rules, the formal ground for seeking review is that the June 21, 1988 opinion of the Court of Appeals demonstrably decides:

> "a federal question in a way in conflict with the applicable decisions of this Court" (Rule 17.1 (c) of this Court)

By so deciding, the Court of Appeals' decision created as of June 21 a force inhibiting the heretofore constitutionally uninhibited publication and circulation of the content not alone of the Magazine 10/ involved in this case; it further imposed as of June 21 a chilling effect on the content of the nation's entire financial press, including all those newspapers which publish financial information.

10/ Stock Market Magazine, also referred to hereinafter as "the Magazine";

I: The June 21 opinion authorizes a District Court, in an action by the SEC, to dictate, in advance of publication, to the publisher and editor of a:

> "bona fide newspaper, news magazine, or business or financial publication of general and regular circulation."

a significant element of the content of the articles it publishes, under threat of contempt, or suppression of the publication if the publication does not comply with the dictate.

a. After extending a bow to the first amendment protection granted to the content of articles published in the Magazine herein involved 10A/ (and all of the nation's financial press, not alone Stock Market Magazine, are directly and equally influenced by this ruling and as directly and equally prejudiced by what followed in the opinion) the Court of Appeals then held specifically that if a District court found that the

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10A/ As noted, obviously this Petitioner does not dispute that portion of the Court of Appeals' opinion; See footnote 8a, p.26, supra.

publication of an article in the Magazine resulted from a "tie-in agreement" under which the company featured in the article bought advertising or reprints of the article as a quid pro quo for its publication, the Court had:

> "no doubt that an injunction could be fashioned to require disclosure when consideration is paid in this distinct form" slip opinion, App. 22a)

The Court of Appeals, using language strikingly singularly similar to that of the District Court, found that it could constitutionally "fashion" such an injunction whereas Chief Judge Robinson of the District Court, ruling on this precise issue, finding that "bona fide" publications such as Stock Market Magazine under Lowe were

"entitled to first amendment rights"

held that the District Court:

> "is unable to fashion a civil remedy for the violation." (App. 38a)

The "violation" is that of Section 17 (b) of

the 1933 Act, the statutory violation addressed by Chief Judge Robinson and the sole alleged violation before the Court of Appeals. Therein lies one split of authority before this Court.

b. The factual result authorized by the Court of Appeals' June 21 opinion disregarded that split. The June 21 opinion authorizes a District Court, in an action brought by the SEC, to enter an injunction against this Magazine or any other financial magazine. That injunction can either track the statutory language of Section 17 (b), as does the injunction sought by the SEC in the District 10/ Court (and as authorized by the Court of Appeals), and based on past conduct,

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10/ "It" (the injunction sought by the SEC) "is precisely tailored to conform to the language of Section 17 (b), a statute which the district court acknowledged was constitutional and could be applied criminally." (emphasis supp (Brief of the SEC to the Court of Appeals, at 2)

subject the Magazine to suppression (barring the use of communication in interstate commerce or the mails), and its publisher (and its editor) to contempt, if the 17 (b) disclosure is not made in future articles in the Magazine. That is what the SEC seeks in this case, and has said so.

c. The Court of Appeals was, however, not precise in its language. It simply stated that:

> "an injunction could be fashioned"
> (Slip opinion, Appendix at 22a)

without telling this Magazine or the financial press what kind of injunction it means. The injunction sought by the SEC (and rejected by Chief Judge Robinson) simply tracked statutory language. It ordered the Magazine to print the fact of a tie-in agreement with a company featured in an article where evidence before the District

Court proceeding pointed to such an agreement in the past. The Court order would disregard the contention by the publisher and editor that the past article resulted from their unsullied journalistic judgment and nothing else. Cut this any way one wishes, the rule is that the SEC and the Court dictate to the publisher and editor what to print in their columns in the future, or face contempt (the publisher and editor) or suppression (the Magazine itself). Regardless of the semantics of this exercise, that dictate by a Court is a classic prior restraint. And Chief Judge Robinson in the District Court so found.

d. If, on the other hand, the injunction authorized by the June 21 opinion does not track statutory language, but simply orders the Magazine to print disclosure of a past "tie-in agreement" if it prints any future article concerning the company "tied-

to risk jail or a fine and suppression of the Magazine in support of their professional opinion. The form of the injunction makes no difference. The dictate of the content of the Magazine by a Court in advance of publication of the Magazine under threat of contempt or suppression is the constitutional problem. In both cases described above, a classic prior restraint is created.

e. Examine farther the carefully imprecise Court of Appeals formulation. Assuming, ex hypothesae, the existence of a "tie-in agreement" between a company and the Magazine which then expresses an editorial opinion--in its editorial columns--on a major national economic issue with which the company agrees. Does this editorial require the printing of the 17 (b) disclosures alongside the editorial? Does the Magazine's expression of editorial opinion without the disclosure risk contempt and suppression. We

note this as an example of the difficulties that are inevitable and of infinite variety if the Courts get into the business of determining what must be printed within the pages of a bona fide financial publication.

f. Is the importance of the required disclosure to the enjoined publication relevant to the inquiry into the creation--vel non--of a prior restraint? Petitioner submits not. Once a Court enters the business of prescribing content of a bona fide publication, the fact that the prescribed content is a relatively short or simple disclosure is constitutionally irrelevant. Court-dictated disclosure in freely circulated publications is like pregnancy. It is either Court-dictated content or it is not. There are no degrees to the condition. Contempt and suppression for rejection of the dictate remains the same whether it be simple and short or lengthy and

prolix.

II: The prior restraint authorized by the June 21 opinion is in direct conflict with 57 years of settled Supreme Court doctrine concerning the protection of the First Amendment.

Petitioner submits that the injunction sought by the SEC in the District Court and the Court of Appeals (quoted in haec verba at p. 17, supra) is a prior restraint constitutionally proscribed by this Court since it ruled, in 1913 that:

> "it is the chief purpose of the (first amendment) to prevent previous restraints upon publication" Near v. Minnesota, 283 U.S. 713 (1931)

The firmness with which this Court has adhered to this doctrine is demonstrated by the concurrence of Justice Brennan in New York Times v. U.S., 403 U.S. at 725-726, where, Justice Brennan held:

> "the first amendment tolerates abso-

> utely no prior judicial restraint of the press predicated upon surmise or conjecture that untoward consequences may result."

and further determined that such interference is constitutionally proscribed unless the Government proves that publication:

> "will result in direct, immediate and irreparable damage to our nation or its people" (Ibid at 730)

See also Nebraska Press Association v. Stuart, 427 U.S. 539 (1976); Oklahoma Publishing Co. v. District Court, 430 U.S. 308 (1970); Bantam Books v. Sullivan, (372 U.S. 58). The degree of peril to the public that is required before prior restraints (either permanent or interlocutory) may be imposed was put succinctly by Justice Brennan:

> "Only governmental allegations and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order." (Brennan, J., concurring in New York Times, 403 U.S. at 726-727)

Nothing remotely threatening the public interest to the degree described by Justice White is present in the case before the Court. Yet the SEC seeks, and the Court of Appeals has authorized the issuance of an interim and final restraining order on Stock Market Magazine unless it prints Court-dictated text with its articles.

III: The injunction which the June 21 opinion authorized is necessarily overbroad; it therefore inexorably suppresses speech which is admittedly constitutionally protected.

Petitioner takes the Government at its word. In its brief to the Court of Appeals, the SEC argued that its injunction would be:

> "fashioned in the language of the statute." (Brief of SEC to Court of Appeals, 21)

Similarly, in papers filed with this Court on November 28, the SEC stated that the injunction it sought in the District Court

(and now seeks under the authority of the June 21 opinion) would be:

> "phrased in terms of the pertinent statutes, that prohibited future violations of Section 17 (b) of the 1933 Act..." (Opposition to Petitioner's Motion for Stay of Mandate, at 3)

and:

> "tracks the precise language of the statute" (Brief of SEC to Court of Appeals, 28)

That injunction must, therefore, be examined. As noted, it is set out in haec verba at page 17, supra. Whatever artful forms the Court of Appeals conceived in which an injunction

"could be fashioned" (Appendix at 22a)

are not before the Court. The injunction sought by the SEC before both courts is.

That injunction explicitly provides that if Stock Market Magazine does not publish (along with any "company" article) any "tie-in agreement" under which advertising or

reprint revenue constituted a quid pro quo for the publication of that article, the:

> "notice, circular, advertisement, newspaper, article, letter, investment service or communication"

containing such "company" article cannot pass in interstate commerce or the mails. There is no way that an offending article can be suppressed in Stock Market Magazine without denying the entire Magazine passage in interstate commerce or the mails. Preventing the circulation of a single article within this or any other Magazine is impossible without interfering with the circulation of the Magazine. Clearly, the entire issue of Stock Market Magazine is what the "circular...newspaper...or communication" in the statutory language is speaking of. Moreover, if the SEC is serious about its statutory responsibility of protecting the public from undisclosed consideration within

the contemplation of Section 17 (b), suppression of the entire publication carrying the violative article is the only way to enfore the statute--in advance of publication. Permitting the offending Magazine to circulate in interstate commerce while its publisher is fined or jailed for contempt plainly does not remedy the evil targeted by 17 (b).

Petitioner respectfully reminds the Court that it is undisputed that 50.44% of the content of the Magazine is general news and commentary. This Court has itself ruled that such content is constitutionally protected:

> "To the extent hat he chart service contains factual information about past transactions and market trends, and the newsletters contain commentary on general market conditions, there can be no doubt about the protected character of the communications..." Lowe, at 472 U.S. 210.

An inevitable result of the injunction

authorized by the Court of Appeals is that half of this Magazine which is acknowledged to be constitutionally protected will be suppressed if its publisher determines to print and publish, absent the 17 (b) disclosure in the single article (or articles) ordered by the Court. Moreover, all of the "company" articles as to which neither the SEC (nor anyone else) objects 11/ will be suppressed under the same circumstances--an unwillingness of the publisher to make the 17 (b) disclosure on the single article--or articles--ordered by the Court. This overbreadth of restraint cannot be avoided if the SEC enforces 17 (b) as it says it will.

11/ Because no "tie-in agreement" exists;

IV. The June 21 opinion is in direct conflict with this Court's decision in Miami Herald v. Tornillo, 418 U.S. 241 (1974); forced disclosure constitutionally is no different from any other Court-imposed dictate to the press.

a. The SEC in its brief to the Court below and in papers before this Court contends that the injunction it seeks is not a constitutionally proscribed prior restraint. It argues:

> "The injunction proposed in this case is not a restraint against publication. The injnction only requires that WSPI disclose any consideration it receives from companies in return for publishing feature articles about the securities of those companies. As such, the proposed injunction is not a restraint upon publication at all, but rather an affirmative disclosure obligation." (SEC Brief to the Court of Appeals, 29)

That precise argument was rejected by this Court in Miami Herald:

> "Appellee's argument that the Florida statute does not amount to a restriction of appellant's right to speak because

> "the statute in question here has not prevented the Miami Herald from saying anything it wished" begs the core question. Compelling editors or publishers to publish that which "reason tells them should not be published" is what is at issue in this case. The Florida statute operates as a command in the same sense as a statute or regulation forbidding appellant to publish specified matter. Governmental restrain on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers." (416 U.S. at 256)

Petitioner submits that Miami Herald disposes of the SEC's distinction between differing varieties of judicially policing our press.

Further, the Florida legislature enacted a provision insuring political candidates the right to reply to criticism by a Florida newspaper. The relative validity of that legislative policy as against Section 17 (b)'s should not be a constitutional consideration, especially in light of this Court's statement in Lowe that:

> "The dangers of fraud, deception or overreaching that motivated the enact-

> ment of the statute are present in personalized communications but are not replicated in publications that are advertised and sold in an open market" (472 U.S. at 210)

It need not be added, again, that Petitioner, in both courts below (as reflected by Judge Robinson's opinion) asserts no objection in this case to enforcement of Section 17 (b) by criminal actions after publication. Neither WSPI nor any other financial publication seeks any license to defraud or deceive. It seeks only freedom from prior restraint.

b. Another portion of Miami Herald is strikingly applicable to the case at bar. Chief Justice Burger wrote:

> (at 418 U.S. 257: "Faced with the penalties that would accrue to any newspaper that published news or commentary arguably within the reach of the right-of-access statute, editors might well conclude that the safe course is to avoid controversy. Therefore, under the operation of the Florida statute, political and electoral coverage would be blunted or recuded. Government-enforced right of access inescapably "dampens the vigor and limits the

variety of public debate."

Public debate during an election, on the one hand, and publication of a "company" article in the financial press, on the other, are indeed different. But both were, until June 21, 1988 very much, in common, free exercises of the journalists' right to print and circulate without government interference. Chief Justice Burger rejected the hand of a court "dampen(ing) the vigor" of such expression. After June 21, 1988, however, the financial press faces the threat of an SEC voyage into a District Court to secure an injunction; every financial publication in this country (and, indeed, <u>every</u> publication of <u>any</u> kind which publishes corporate news and sells ads or reprints) would, if the SEC ordered it, be forced to (1) turn over to the SEC all of its financial books and records disclosing receipt of advertising or reprint revenue; (2) align this data with each and

every article it had published describing the companies which purchasedthe ads or reprints; (3) convince the SEC that each such article was published because the editor or publisher deemed it newsworthy and for no other reason.

Whose editorial judgment would dictate the outcome of this regulatory exercise, the SEC's (or, if it came to it, a court's) or the publication's? Facing an injunction against publication and circulation of an entire newspaper of magazine, only a Peter Zenger would tell the SEC, and a Court, that what he prints (and what he refused to print) is no concern of either the SEC or the Court.

As a very real and practical matter, a prudent editor facing an injunction against publication and circulation of his entire publication must seriously consider keeping future issues virginal of all mention of past advertisers in the Magazine, and just as free of mention of purchasers of reprints of past

articles. How far back must this prudent editor trace his ad and reprint sales, often made by employees long since departed? The enforcement scenario imposed by the June 21 opinion is a nightmare for any financial publication large or small. Each may feel entirely sure of its own policies and practices. Yet none can risk even the slightest chance of an SEC invasion or--God save the day--the suppression of an entire issue. These very real fears are the consequences of regulated press; they are not found in a free press. Petitioner submits that just as Chief Justice Burger recognized the pressures of government intervention in the preparation and dissemination of straight news in Miami Herald, the very same pressures exist for the financial press in consequence of the June 21 decision.

V: Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 does not support the injunction authorized by the June 21 decision.

Pittsburgh Press v. Human Relations Commission, 413 U.S. 376 affirmed the power of a court to enjoin publication of an advertising violating Pittsburgh's ban on sex preference in employment. The Court took pains, however, to note that it was dealing with an advertisement and not content of the newspaper:

> (at 391) "Nor, a fortiori, does our decision authorize any restriction whatever, whether of content or layout, on stories or commentary originated by Pittsburgh Press, its columnists or contributors. On the contrary, we reaffirm unequivocally the protection afforded to editorial judgment and to the free expression of views on these and other issues, however, controversial."

The June 21 opinion of the Court of Appeals authorizes a clear restriction on content. "Company" articles subject to a "tie-in

agreement" cannot appear without disclosure of that agreement. Whether that restriction is good or bad as a matter of policy, it remains a restriction on the content of future issues of Stock Market Magazine and any other financial publication, and, therefore, explicitly beyond the reach of the Pittsburgh Press holding.

There is a more fundamental difference here. Pittsburgh Press did not in any way interfere with or even touch the journalistic decision of any editor to publish or not to publish any story. The June 21 decision does: it subordinates the determination of the editor or a publisher as to why he published a story to a court determination as to why the story was published. That is judicial intervention in the editorial process; it is court intervention into journalistic ethics; it is court intervention in the freedom of an editor to publish

without fashioning a paper trail to justify--years later--his decision to publish.

VI. The public is adequately protected by the criminalsanctions found in the 1933 Act.

Were this Court (and the Court of Appeals) removing all remedies for the protection of the public from fraud and deception, the constitutional inhibition against permitting a prior restraint might veer. But neither court is. Chief Judge Rcbinson stated:

> "The SEC may still bring a criminal action against it. (WSPI, the Petitioner herein) "if it can show that Defendant's violations were willful."

Section 20 (b) of the Act (15 U.S.C. 77t (b) clearly provides for such criminal actions and there are other provisions in the arsenal that the SEC can bring to bear against fraud or deception in securities dealings. What the SEC is telling this Court is that the

threat to the public in this case is at the same level as the loss of an American warship during war, justifying a prior restraint against publication under this Court's New York Times rule. And the SEC states this when there is a full remedy available for the protection of the public without invasion of First Amendment rights.

VII: The rationale of the June 21 decision extends regulatory control of printed speech far beyond "commercial speech" into a limitless area coextensive with government economic regulation; there is no authority anywhere for this vast expansion of control over protected speech.

The Court of Appeals carefully avoids reliance on any concepts of "commercial speech" when it seeks to justify the prior restraint it sanctions:

> "In short, we do not see a clear fit between the commercial speech doctrine and the publications that the SEC here seeks to regulate." (Slip opinion, Appendix, at 15a)

Rather, it relies on a theory of the government's incremental regulatory power over otherwise protected speech in areas where the government has undoubted regulatory powers over conduct unrelated to speech:

> "We believe instead that the government may have the power to regulate Stock Market Magazine, not because the articles are "commercial speech": but rather because of the federal government's broad powers to regulate the securities industry. Where the federal government extensively regulates a field of economic activity, communication of the regulated parties often bears directly on the particular economic objectives sought by the Government." (Ibid)

This rationale is as dangerous as the result it sanctions. None of the cases cited by the Court of Appeals immediately following that statement supports the imposition of any prior restraint anywhere in areas otherwise subject to legitimate regulation. The Court of Appeals cited NLRB v. Gissel. 395 U.S. 575 (regulation of labor relations) in which the

Supreme Court stated:

> (at 617) "But we do note that an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a Union or the Board"

The Court of Appeals cited dicta in NAACP v. Claiborne Hardware, 458 U.S. 886 in support of its notion of incremental governmental regulatory control over speech. But the holding of Claiborne as much as anything else was:

> (at 918) "While the State legitimately may impose damages for the consequences of violent conduct, it may not award compensation for the consequences of nonviolent, protected activity." (emphasis supplied)

Finally, the Court below put great stress on Dunn & Bradstreet v. Greenmoss Builders, 472 U.S. 749 (1985. That case had nothing whatever to do with an injunction of any kind. It merely held that damages at law may be awarded in a libel action brought by a

private company for a false D&B report without according the Defendant the "public figure" defense in such an action for damages.

As for the securities cases cited by the Court of Appeals Zweig v. Hearst Corp., 594 F.2d 1261 (C.A. 9, 1979) was a Section 10 and Rule 10-b-5 action; no injunction was sought. SEC v. Blavin, 760 F.2d 706, decided before Lowe, involved injunctive relief under the Investment Advisers Act for published investment advice (beyond the SEC's reach after Lowe) and an injunction against further violations of Sections 10 and Rule 10-b-5, having nothing to do with speech of any kind. Nowhere has any Court expanded legitimate agency control over securities transactions to include to a prior restraint against the financial press' description of these transactions in its publication.

The Court of Appeals' "modest proposal" for incremental expansion by regulatory agencies into regulationof speech bearing:

> "directly on the particular economic objectives sought by the Government" (Slip opinion, 15)

is profoundly disturbing. The Government has "economic objectives" in insuring fair competition. Does that limit the first amendment rights of targets of FTC or Department of Justice investigations? The Government retains "particular economic objectives"in tax enforcement, and regulation of trucking, commercial shipping and the airlines. Under the Court of Appeals' theory is there legally extant ancillary incremental authority over protected speech, to be exercised by the various regulatory agencies seeking these "particular economic objectives." And under the Court of Appeals' rationale is any one of those agencies less

entitled to control:

> "communication of the regulated parties" ...(that) "bear directly on the particular economic objectives sought by the Government" (Slip opinion, 15)

than is the SEC?

The Court of Appeals has no case authority anywhere to support this rationale.

VIII: This case is ripe for review by this Court.

The June 21 decision of the Court of Appeals stands as the law of the District of Columbia Circuit unless and until it is reviewed by this Court. It is also the law of this case unless and until it is reviewed by this Court.

Petitioner submits that the Court of Appeals in its June 21, 1988 opinion misconstrued Section 17 (b) in a major manner: the June 21 opinion interpreted that statute (Section 17 (b)) as authorizing an

injunction requiring a bona fide financial publication to make certain disclosures under it; the June 21 opinion further interpreted that statute as justifying a contempt citation against an editor or publisher of a publication which refused to make such disclosures; and that opinion further interpreted that statute as justifying suppression of an entire publication (from circulation in interstate commerce or in the mails) if it refused to make such disclosures. On those points the June 21 opinion is simply wrong as a matter of law. Not only is it wrong, but the June 21 opinion's interpretation of the statute as it applies to this Petitioner is unconstitutional. Those legal errors in the June 21 opinion are clear on its face and final. As such they are presently reviewable by this Court.

Petitioner submits to this Court that,

contrary to what its record reflects it has done in the past, it is nonetheless constitutionally free of any threat of injunction if it determines to publish articles in its Magazine as a quid pro quo for the purchase of advertising or reprints of the article by the subject of the article. Petitioner further submits to this Court that the Court may assume that Petitioner will, in departure from its past practice, publish such an article under a "tie-in agreement" as an assertion of First Amendment rights to which it is entitled.

Petitioner is now, in praesenti, constitutionally aggrieved. It is forced into a trial to defend the right to publish its Magazine free from dictates from a Court on what it can print and what it can refuse to print. The Court of Appeals' determination (in the June 21 opinion) that a Court can legally dictate this to Petitioner gives

Petitioner a present constitutional grievance. If it has such a present constitutional grievance, Petitioner is properly before this Court now.

Wherefore, Petitioner prays this Court to issue a writ of certiorari to the U.S. Court of Appeals for the District of Columbia Circuit ordering review by this Court of its decision of June 21, 1988 on the grounds set forth in this Petition.

Respectfully submitted,

Joseph H. Sharlitt
Attorney for Petitioner
Wall Street Publishing
Institute

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5646

SECURITIES & EXCHANGE COMMISSION, APPELLANT

v.

WALL STREET PUBLISHING INSTITUTE, INC.,
d/b/a STOCK MARKET MAGAZINE

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 82-02000)

Argued September 18, 1987
Decided June 21, 1988

Richard A. Kirby, Assistant General Counsel, Securities & Exchange Commission, with whom *Daniel L. Goelzer*, General Counsel, *Jacob H. Stillman*, Associate General Counsel and *Paul Gonson*, Solicitor, Securities & Exchange

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Commission, were on the brief, for appellant. *Leslie E. Smith*, Attorney, Securities & Exchange Commission, also entered an appearance for appellant.

Joseph H. Sharlitt for appellee.

Before: SILBERMAN and D.H. GINSBURG, *Circuit Judges*, and MCGOWAN,* *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

SILBERMAN, *Circuit Judge*: This appeal occasions our second review of efforts by the Securities and Exchange Commission to enjoin certain practices of Stock Market Magazine and its corporate parent, Wall Street Publishing Institute, Inc. ("WSPI"). At issue here is the SEC's request, under the anti-touting provisions of the Securities Act of 1933, 15 U.S.C. § 77q(b) (1982), for an injunction that would require the magazine to disclose consideration received in exchange for publishing articles that feature particular firms' securities. The district court denied the requested injunction, characterizing it as a prior restraint prohibited by the First Amendment. We disagree (although not entirely) with the district court's analysis, and so reverse its decision and remand the case for further proceedings to determine whether the requested injunction should issue.

I.

WSPI publishes Stock Market Magazine, a twenty-two year old publication directed to small investors, ten times annually. A few clerical and part-time employees assist with production, but the magazine essentially is a two-person operation, consisting of WSPI's President, Angelo R. Martinelli, who oversees the business end of the publication, and Bernard D. Brown, the Managing Editor.

Despite its limited staff, Stock Market Magazine has attracted a circulation of 15,000, including some 12,000

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* Judge McGowan concurred in the judgment but died before this opinion issued.

subscribers. According to a 1982 Stock Market Magazine subscribers' survey, 98% of its readers own securities, with 70% owning securities valued at more than $15,000 and 44% owning securities valued at more than $25,000. The magazine offers its readers financial news in two forms: the first is comprised of the magazine's independently written articles, which offer financial news of general interest, and columns on topics that range from personal finance to national politics; the second encompasses longer feature articles, which focus primarily on individual companies.

Each issue typically contains seven or eight feature articles that profile an individual firm, and these articles uniformly portray the subject firm as an appealing investment prospect because of its market position, product offering, or management strategy. Indeed, the articles describe the featured companies in unabashedly glowing terms, as any selection of headlines suggests,[1] and usually include a review of the performance and prospects of the companies' securities. We are told they never contain a negative report, or even reflect mild skepticism, concerning the featured companies or their stock.

According to the SEC and several of its discovery deponents, the articles' lack of editorial balance is not accidental, but is a consequence of the various arrangements by which they come to be written. Some articles are written by the featured company itself, submitted to the magazine, and published substantially as submitted. Others are written by public relations firms paid by the featured companies. And on occasion, the contributing editors of the magazine or Brown himself write articles on a freelance basis. Then also, the writers' fees are

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[1] *E.g.*, Andrews, *Health Chem's Insect Trap Holds High Profit Potential*, Stock Market Mag., Oct. 1978, at 20; Brennan, *Chyron Corporation: Growing Steadily in Television Graphics Equipment*, Stock Market Mag., June 1984, at 20.

paid not by the magazine but by the featured companies. None of these arrangements can be discerned from the firm's masthead, which describe the publicist-writers as contributing editors, and hold out the feature articles as "based on thorough research and first-hand interviews with company officials, economists, security analysts, tax accountants, and other experts." [2]

In addition to writers' fees and other amenities, such as free office space, that the featured companies or their publicists provide to Stock Market Magazine's writers, the company articles also appear directly to generate revenue for WSPI. Featured companies regularly purchase article reprints, which are available only through the magazine, and advertising space, which Brown encourages them to place in issues other than the one in which the company article appears, to avoid "unseemliness."

These practices attracted the attention of the SEC, which initiated a civil suit against WSPI under four separate provisions of the federal securities laws on July 19, 1982.[3] Among other allegations, the SEC maintained that the provision of free text (whether directly from the company or a public relations firm), writers' fees, advertising purchases, and reprint orders was a *quid pro quo* for the magazine's publication of the feature articles, and that failure to disclose this consideration violated section 17(b) of the Securities Act of 1933, 15 U.S.C.

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[2] The magazine discontinued this claim during the pendency of this litigation, but none of the changes in practice undertaken by the magazine is relevant to the disposition of this appeal.

[3] The complaint alleged violations of the Investment Advisers Act of 1940, 15 U.S.C. §§ 80b-3, 80b-6; the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b); and the Securities Act of 1933, 15 U.S.C. § 77q(b); and sought an injunction restraining WSPI from further violations.

§ 77q(b), which prohibits publishing a description of a security in exchange for undisclosed consideration.[4]

After extensive discovery, the parties filed cross motions for summary judgment in the district court and the SEC prevailed. The district court issued a permanent injunction, requiring WSPI to register as an investment adviser and barring further violations of the securities laws. *SEC v. WSPI*, 591 F. Supp. 1070, 1090 (D.D.C. 1984). The injunction included a provision tracking the language of section 17(b). Declining to resolve the dispute as to whether reprint orders functioned as a *quid pro quo* for publication of the company articles, the court held that the writers' fees were consideration, and that failure to disclose them violated section 17(b). *Id.* at 1089. WSPI appealed, but this court held the appeal in abeyance pending decision by the Supreme Court of a case presenting similar issues under the Investment Advisers Act, *Lowe v. SEC*, 472 U.S. 181 (1985).

Lowe involved a First Amendment challenge to an injunction completely prohibiting publication of a newsletter containing nonpersonalized investment advice and commentary. The injunction issued under the same provisions of the Investment Advisers Act, 15 U.S.C. §§ 80b-3 and 80b-6, that had, in part, supported the district

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[4] Section 17(b) provides as follows:

> It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

15 U.S.C. § 77q(b).

court's order against WSPI. The Supreme Court, avoiding the constitutional challenge, construed a statutory exclusion for "the publisher of any *bona fide* newspaper, news magazine or business or financial publication of general and regular circulation" to include the defendant's investment advice newsletter. 472 U.S. at 204-07. In light of *Lowe*, but without consideration on the merits, we remanded this case to the district court for reconsideration.

On remand, the SEC abandoned its claims under the Investment Advisers Act, but continued to press its claims under section 17(b) and under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b). The district court refused relief on either claim, holding as to the latter that "Stock Market Magazine's representations are not 'in connection with the purchase or sale of a security,'" as required by the statute, and therefore section 10(b) "simply does not apply." *SEC v. WSPI*, No. 82-2000, slip op. at 4-5 (D.D.C. Aug. 1, 1986) (August Order). The SEC has not appealed the district court's dismissal on remand of the section 10(b) charges.

With respect to the claims based on section 17(b), the district court concluded that "by designating publications such as Stock Market Magazine as *bona fide* publications entitled to First Amendment rights," the Supreme Court's decision in *Lowe* precluded a civil remedy for the statutory violation. The district court held:

> Although [the SEC] claims that in seeking injunctions which track the language of the Securities Exchange Act and the Securities Act it is not seeking to enjoin the publication of Stock Market Magazine, the effect of such an Order is clearly a prior restraint which violates the First Amendment. Although the Court's Order does not forbid publication entirely, it does place qualifications on publication which, if violated, could lead to punishment for contempt. . . . [I]t is the injunction itself, which threatens this

punishment before the fact of publication, which violates the First Amendment.

August Order at 5-6.

Asserting that "[t]he SEC may still bring a criminal action against [WSPI] under section 17(b) if it can show that [the] violations were willful," *id.* at 6, the district court refused the requested injunction and dismissed the SEC's complaint. This appeal, limited to the issues presented under section 17(b), followed.

II.

A.

In support of the district court's judgment, WSPI argues that section 17(b) does not apply at all to Stock Market Magazine's company articles.[5] According to WSPI, the sole purpose of the Securities Act of 1933 is to ensure adequate disclosure of information at the time securities are first sold to the public; therefore, section 17(b) should be read to apply only to original distributions of securities subject to section 5 of the Securities Act of 1933, 5 U.S.C. § 77e.

WSPI argues that the terms "issuer, underwriter and dealer," when used together, refer exclusively to original distributions of securities regulated by section 5, and asserts that "[n]owhere in the 1933 Act did Congress use

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[5] The Commission complains that this argument was not presented to the district court and aptly notes our refusal to address issues raised for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Kassman v. American Univ.*, 546 F.2d 1029, 1032 (D.C. Cir. 1976) (per curiam). However, in light of our obligation to avoid unnecessary adjudication of constitutional claims when a statute's language or legislative history admits of a limiting construction, *Ashwander v. TVA*, 297 U.S. 288, 341-56 (1936) (Brandeis, J., concurring), we may consider this argument. *See Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987).

the term 'issuer' outside the distribution context." Relying on excerpts from the legislative history of section 5, none of which refer or pertain to section 17(b), and on a selective and tenuous comparison of statutory language, WSPI concludes that section 17(b) applies only to a publication that describes a security that is part of an original distribution and not to those traded only in the securities aftermarket. If WSPI is correct, the statute cannot support an injunction against Stock Market Magazine because the company articles do not describe original distributions of stock.

The Commission contends that Congress' purpose extends beyond original distributions, and that its use of the terms "issuer, underwriter or dealer" simply (and sensibly) limits the disclosure requirement to consideration received from those who have a financial interest in fraudulently presenting promotional literature as objective reporting. The SEC thus argues that WSPI's construction is incompatible with the broad language of the statute and with relevant portions of the principal committee reports on the 1933 Act.

The language of section 17(b), *supra* note 4, does not readily lend itself to the restrictive construction urged by WSPI. By its terms, the statute applies to "any" person who publishes "any" article which, "though not purporting to offer a security for sale, describes such security for a consideration received . . ., directly or indirectly, from an issuer, underwriter, or dealer" without disclosing the consideration. 15 U.S.C. § 77q(b). Nothing in this language suggests that Congress intended to limit the class of "securit[ies] for sale" subject to this provision to original distributions, as it did when it established the registration requirements in the same statute. *See* 15 U.S.C. § 77e.

The plain language of the statute thus appears to be dispositive of WSPI's contention, but even if an alternative reading were possible, we think it foreclosed by the

legislative history. The Senate Committee Report emphasized that violations of the statute "may be prosecuted regardless of whether the security is old or new." S. REP. No. 47, 73d Cong., 1st Sess. 4 (1933). The House Committee Report also indicated that the provisions would apply whether the securities involved were "new or already outstanding." H.R. REP. No. 85, 73d Cong., 1st Sess. 6 (1933).[6] Such a clear statement of purpose in the principal committee reports must be given effect when it accords with the interpretation urged by the agency administering the statute. *See Miller v. FMSHRC*, 687 F.2d 194, 195 (7th Cir. 1982). WSPI's statutory argument is too unpersuasive to be adopted even to avoid reaching the constitutional claims presented. *See Lowe*, 472 U.S. at 212 (White, J., concurring), quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932) (construction must be "fairly possible" to avoid a constitutional issue).

B.

The district court denied the injunction,[7] on grounds

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[6] These statements are not explicitly tied to section 17(b), but they do refer to deceptive practices. This reference necessarily includes section 17(b), which the House Report described as "particularly designed to meet the evils of the 'tipster sheet,' as well as articles in newspapers or periodicals that purport to give an unbiased opinion but which opinions in reality are bought and paid for." House Report at 24. *See United States v. Amick*, 439 F.2d 351, 365 (7th Cir. 1971).

[7] The pertinent part of the requested injunction, which the district court granted in its first decision, reads as follows:

> [ORDERED], that Wall Street Publishing Institute, Inc., its officers, directors, agents, servants, attorneys, employees, successors and assigns, and those persons in active concert or participation with them, are permanently restrained and enjoined from making use of any means or instruments or communications in interstate commerce or by the use of the mails, publishing, giving publicity to, or circulating any notice, circular, advertisement, newspaper, article, letter, investment service, or communica-

that it would operate as a prior restraint, holding that the SEC had failed to satisfy the extraordinary showing of potential danger that must support any such restraint. August Order at 6, relying on *New York Times Co. v. United States*, 403 U.S. 713, 726-27 (1971) (Brennan, J., concurring) (publication must "inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea" before restraint is permissible). According to the court, "[t]he fraud committed by [WSPI] in this action does not even arguably reach this level of danger. Therefore, the injunction sought by the SEC would be unconstitutional." August Order at 6.

The Commission contends that the prior restraint doctrine is the wrong analytical framework for a *disclosure* requirement if imposed only after full judicial review on the merits. We agree. The Supreme Court has never held that all injunctions affecting a newspaper's publication are impermissible, or that all must satisfy the standard applied to prior restraints. "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973). Orders that are carefully focused, address a continuing course of speech, and are imposed after an opportunity for full merits consideration are not properly analyzed as prior restraints. *Id.*

> tion[] which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received directly or indirectly from, an issuer, underwriter or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

SEC v. WSPI, No. 82-2000 (D.D.C. July 12, 1984) (order granting permanent injunction).

at 390-91; *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam); Redish, *The Proper Role of the Prior Restraint Doctrine in First Amendment Theory*, 70 VA. L. REV. 53, 55, 58 (1984).

In *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931) and *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), for example, "the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct." *Id.* at 311 n.3. That approach raises the distinct possibility that future speech, fully entitled to First Amendment protection, would nevertheless be enjoined. Here however, the SEC is not requesting an injunction against future articles, as yet unconsidered by any court. Rather, it requests an injunction against a continuing practice of publishing feature articles without disclosure of consideration. The propriety of such an injunction is fully capable of being judged now, and is constitutionally permissible, as we explain, if, but only if, it does not chill or prohibit protected speech in the future.

In sum, the prior restraint doctrine is not precisely applicable to the requested relief in this case. Our view is supported by Justice White's concurring opinion in *Lowe*, joined by two other justices, which undertook the First Amendment analysis avoided by the majority in that case. 472 U.S. at 227-236. Justice White agreed that the injunction before the court, which banned publication of an investment newsletter altogether, could not stand. "Such a flat prohibition or prior restraint on speech," in his view, "is, as applied to fully protected speech, presumptively invalid." *Id.* at 234. The opinion took particular care to state, however, that a more limited injunction, particularly an order "to require investment advisory publishers to disclose material facts," *id.* at 225, might be constitutionally permissible, depending on the level of protection, if any, the First Amendment provided to the speech in question.

III.

The district court, concluding that the *Lowe* decision "designat[ed] publications such as Stock Market Magazine as *bona fide* publications entitled to First Amendment rights," August Order at 5, appears to have assumed that *any* injunction would necessarily reach fully protected speech, rather than speech that is subject to more extensive regulation. WSPI defends this conclusion on appeal, and raises the specter that if section 17(b) disclosure requirements can reach protected speech, "it would put the SEC in every newsroom and editorial office in this country."

While it is true that after *Lowe*, the Stock Market Magazine cannot be considered an investment adviser within the meaning of the Investment Advisers Act, we do not think that the feature articles are necessarily immune from all regulation. The district court held that after *Lowe*, a civil remedy for violation of 17(b) was no longer available against a publication comparable to the "bona fide newspapers" exempt from the registration requirements of the Investment Advisers Act. We disagree with this conclusion, for we think the *Lowe* decision is distinguishable on several grounds.

In *Lowe*, the Court was presented with an injunction that absolutely prohibited the petitioner from "publishing nonpersonalized investment advice and commentary in securities newsletters." 472 U.S. at 183. Under the registration provisions of the Investment Advisers Act, the SEC could require individuals who provided investment advice to register in accordance with the Act, and could seek injunctions against unregistered persons who gave such advice. As both the opinion of the Court and Justice White's concurrence noted, this aspect of the Investment Advisers Act was basically a scheme for licensing speakers, and as such powerfully implicated the First Amendment, for "[t]he struggle for the freedom of the

press was primarily directed against the power of the licensor." *Lowe*, 472 U.S. at 205 (quoting *Lovell v. City of Griffin*, 303 U.S. 444 (1938)); *see also* 472 U.S. at 229-30 (White, J., concurring). By contrast, the order requested by the SEC here does not forbid any person from publishing any material at all; it requires instead a disclosure statement when the Stock Market Magazine describes a company's stock in exchange for consideration. In *Lowe*, moreover, no allegations were made that the newsletter "contained any false or misleading information." 472 U.S. at 209. Stock Market Magazine's presentation of articles as objective reporting, if in fact the articles are paid for by the company featured, would be inherently misleading. *See Zweig v. Hearst Corp.*, 594 F.2d 1261, 1266-67 (9th Cir. 1979). For these reasons, we do not think *Lowe* prohibits the issuance of *any* injunction here.

We therefore need to decide whether 17(b)'s language, prohibiting a "newspaper . . . which, though not purporting to offer a security for sale, describes such security *for a consideration* received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt . . . of such consideration" (emphasis added), can support an injunction that forces disclosure of "free text," writers' fees, and purchases of advertising and reprints. The parties recognize that the level of constitutional protection to be accorded publications such as Stock Market Magazine, which at least approach general circulation, bears on our interpretation of the statute but vigorously disagree as to what is that level. The SEC characterizes the company articles in Stock Market Magazine as commercial speech, and as such entitled only to the limited protection that the First Amendment extends to such communications. *See generally Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 106 S. Ct. 2968 (1986). WSPI contends, on the other hand, that the articles cannot be separated from speech that lies at the core of First Amendment interests.

The SEC's position is difficult to reconcile with the contours of the commercial speech doctrine as drawn in Supreme Court opinions. In *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980), the Court described commercial speech as "expression related *solely* to the economic interests of the speaker and its audience," *id.* at 561 (emphasis added) and later spoke of the " 'commonsense distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech.' " *Id.* at 562 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). Later, in *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 66-67 (1983), the Court reiterated the "speech which does no more than propose a commercial transaction" formulation and characterized this language as describing the "core" of commercial speech, thereby suggesting that commercial speech encompasses a somewhat broader area. Then the Court identified three characteristics of commercial speech, while being careful to note that none is necessary or sufficient for speech to be classified as commercial. According to the Court, speech that is *concededly* an advertisement, refers to a specific product, and is motivated by economic interest may properly be characterized as commercial speech. 463 U.S. at 66-67.

Under the broader formulation of *Youngs Drug*, we are not convinced that the feature articles under consideration here are commercial speech. The articles are not "conceded" to be advertisements, and in fact, are not in an advertisement format. Generally two or three pages long, they are indistinguishable from run-of-the-mill newspaper or magazine stories. Furthermore, while most of the articles specifically mention the company's stock along with its price history, not all do this, and in none is the reference to the company's stock particularly prominent. So, it would be difficult to draw a doctrinal

line between these articles and any article that focuses on a particular company.

In short, we do not see a clear fit between the commercial speech doctrine and the publications that the SEC here seeks to regulate. And, we are mindful of Justice Stevens' warning in his concurring opinion in *Central Hudson* that "it is important that the commercial speech doctrine not be defined too broadly lest speech deserving of greater constitutional protection be inadvertently suppressed." 447 U.S. at 579. It is, in our view, difficult to foresee the implications of applying the doctrine here, and, in any event, we do not believe it is necessary in order to justify regulation. We believe instead that the government may have the power to regulate Stock Market Magazine, not because the articles are "commercial speech," but rather because of the federal government's broad powers to regulate the securities industry.[8] Where the federal government extensively regulates a field of economic activity, communication of the regulated parties often bears directly on the particular economic objectives sought by the government, *see, e.g., NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-620 (1969), and regulation of such communications has been upheld. *See NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 at 912 (1982) ("Governmental regulation that has an incidental effect on First Amendment freedoms may be justified in certain narrowly defined instances"; labor and antitrust cases cited as examples); *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 150 (1967) (Opinion of Harlan, J.). If speech employed directly or indirectly to sell securities were totally protected, any regulation of the securities market would be infeasible—and that re-

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[8] *See, e.g.*, Securities Exchange Act of 1934, § 14, 15 U.S.C. § 78n (1982) (regulation of proxy solicitation); *id.* § 13, 15 U.S.C. § 78m (regulation of annual reports); Securities Act of 1933, § 5, 15 U.S.C. § 77e (1982) (regulation of stock prospectus); *id.* § 10, 15 U.S.C. 77j (same).

sult has long since been rejected. *See, e.g., Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61-62, 64 (1973), and cases cited.

The Supreme Court itself has distinguished between the government's power to regulate "commercial speech" and its powers to regulate the securities industry. In *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749 (1985), following a discussion of the commercial speech doctrine, the plurality said "[o]*ther* areas of the law provide further examples [of permissible regulation]" and included "the exchange of information about securities, [and] corporate proxy statements" as one of those areas. 472 U.S. at 758 n.5 (emphasis added). And in *Ohralick v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), the Court said "[n]either *Virginia Pharmacy* nor *Bates* purported to cast doubt on the permissibility of" regulation of the exchange of information about securities.

Dun & Bradstreet therefore indicates that securities regulation is a form of regulation distinct from the more general category of commercial speech, and *Ohralik* suggests that the First Amendment protections provided by the commercial speech doctrine do not *detract* from the government's regulatory power over the securities market. In a case decided after the Supreme Court extended First Amendment protection to commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), the First Circuit observed: "Though first amendment protection has lately been afforded some types of commercial speech, the first amendment has not yet been held to limit regulation in areas of extensive economic supervision, such as the securities, antitrust, and transportation fields . . . ." *Bangor & A. R. R. v. ICC*, 574 F.2d 1096, 1107 (1st Cir. 1978) (citations omitted).

The First Circuit spoke long before the Supreme Court's decision in *Lowe*, and after that decision we think it would be an overstatement to assert that the First Amend-

ment does not *limit* regulation in the securities field. We do share the First Circuit's assumption, however, that regulation of the exchange of information regarding securities is subject only to limited First Amendment scrutiny. Speech relating to the purchase and sale of securities, in our view, forms a distinct category of communications in which the government's power to regulate is at least as broad as with respect to the general rubric of commercial speech. Under the commercial speech doctrine, a court judging whether a particular regulation affecting speech is constitutional must determine, among other issues, "whether the asserted governmental interest is substantial." *Central Hudson*, 447 U.S. at 564. Here, however, we do not think it necessary for us to inquire, as we would if only commercial speech were involved, whether the government's specific regulatory objective—disclosure of consideration—is constitutionally permissible. In areas of extensive federal regulation—like securities dealing—we do not believe the Constitution requires the judiciary to weigh the relative merits of particular regulatory objectives that impinge upon communications occurring within the umbrella of an overall regulatory scheme. We note, however, that even if we were so required, disclosure requirements have been upheld in regulation of commercial speech even when the government has not shown that "absent the required disclosure, [the speech would be false or deceptive] or that the disclosure requirement serves some substantial government interest other than preventing deception." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. at 626, 650 (1985). Indeed, the disclosure provisions of the Foreign Agents Registration Act, requiring that foreign films be labeled "political propaganda," has recently been upheld by the Supreme Court as applied to fully protected speech. *Meese v. Keene*, 107 S. Ct. 1862 (1987). It is, according to the Court, impermissibly "paternalistic" for courts to challenge such disclosure requirements because "zeal to protect the public from 'too much information' could not

withstand First Amendment scrutiny." *Id.* at 1872 (quoting *Virginia Pharmacy Bd.*).[9]

Stock Market Magazine's failure to disclose consideration received in return for publication is then, in principle, constitutionally proscribable. Nonetheless, we think we are obliged to consider—no matter how the speech is categorized—whether the government's interpretation of consideration poses the danger that "speech deserving of greater constitutional protection [will] be inadvertently suppressed." *Central Hudson*, 447 U.S. at 564-65; *id.* at 579-83 (Stevens, J., concurring). Here is our difficulty, for the SEC contends that providing publishers free text, whether directly through the provision of finished articles or indirectly by paying writers' fees to public relations firms, constitutes "consideration" within the meaning of section 17(b). The SEC argues that Stock Market Magazine publishes the company articles "substantially" as penned by the featured companies or their publicists and that this practice should be disclosed. Conditioning regulation on the extent to which text is used, however, would

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[9] Requiring disclosure of a material fact in order to prevent investor misunderstanding is the very essence of federal securities regulation. "The appropriate test for the materiality of an omitted fact is whether there is a substantial likelihood that a reasonable investor would consider the fact important in making his or her investment decision." *Zweig v. Hearst Corp.*, 594 F.2d 1261, 1266 (9th Cir. 1979) (citing *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438 (1976)); *see Basic Inc. v. Levison*, 108 S. Ct. 978 (1988) (explicitly adopting this standard of materiality for Rule 10b-5 violations). To be sure, *Lowe* suggests "[t]he dangers of fraud, deception, or overreaching" may be lessened in publications, like Stock Market Magazine, "that are advertised and sold in an open market," 472 U.S. at 210, but the Court has never required a determination that speech be actually fraudulent in order to permit government regulation, but only that there be a "significant possibility" that the speech be misleading. *Friedman v. Rogers*, 440 U.S. 1, 13 (1979); *see also Zauderer*, 447 U.S. at 563.

result in both SEC and court interference with the "crucial process" of editorial control, interference that the Supreme Court has decried as particularly repugnant to core First Amendment concerns. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 257-58 (1974).

If, as the SEC argues, the consideration it wishes disclosed is the *substantial* use of free text, who will determine the line between substantial and insubstantial? Using what standards? If, for example, the editor of the magazine were to add several paragraphs to the article and edit the rest, would that have to be disclosed? Suppose instead of an article, the magazine is furnished a rather long press release, must that be disclosed if the press release is published with no change? With some change? If so, how is that distinguished from much financial or political news coverage in other newspapers and magazines with wider circulation, surely assumed to be fully protected by the First Amendment? If the SEC's requested injunction were to issue, these vexing questions could only be answered in a contempt proceeding, and the threat of that would surely chill protected speech. *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973).[10] Nor do we think that a subject company's payment of fees to a public relations firm (or a freelance writer) to produce the text supplied to the magazine stands on any different footing than the free text itself. The public relations firm, in

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[10] On the other hand, if the SEC's interpretation of "consideration" were thought to reach *all* free text supplied to the magazine no matter how marginal its use, we would see less interference with the editorial process, but, in that event, government regulation would directly interfere with the news gathering operations of the magazine. Requiring disclosure of sources of information used in a publication, it should be readily understood, strikes at the very heart of a free press. *Cf. Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972). Furthermore, the less the text is used, the less the government interest is in disclosing its receipt.

that event, simply replaces an employee of the company who would otherwise write the material. Disclosure of that arrangement would still depend, according to the SEC, on how much of the text produced is actually used by the magazine.

The fundamental difficulty with the SEC's interpretation of "consideration" in 17(b) as applied to this case, involving a magazine in many respects similar to one of general circulation, is that one of the objects of its requested injunction, the receipt of free text, inevitably implicates interference with fully protected journalistic activity. In other words, so long as consideration is defined in accordance with the material used in the publication, the very definition of consideration will necessarily constitute the line between the sphere of permitted regulation—disclosure of the omitted fact—and wholly protected speech. The crucial factor that distinguishes the feature articles from the balance of the magazine—and which constitutionally justifies regulation—is not the glowing terms used to describe the companies featured. If that were so, the SEC and the federal judiciary would be propelled into what is very close to content regulation of speech. *Cf. Boos v. Barry*, 108 S. Ct. 1157 (1988).[11] Rather, permissibility of the disclosure requirement must necessarily turn solely on whether consideration was paid to the magazine for publication of the article—and not on the content of the publication.[12] Were the government

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[11] Content-based regulations are objectionable because they put the government into the unneutral position of approving some while disapproving other speech, on the basis of the viewpoints expressed. If this problem is not precisely present here, it is certainly analogous.

[12] Appellee does not argue that the feature articles, appearing as they do in a magazine aimed almost exclusively at small investors, do not bear on the stock price of the company featured. We need not, therefore, delineate the boundary between such articles and news articles in a magazine or newspaper of general circulation that also focus on a particular

to show, for example, direct cash payments to Brown, the Managing Editor, such transactions might well be distinguishable from writers' fees because the payments might be tantamount to payments to the publisher to *carry* the article. Requiring disclosure of such payments would not interfere with either editorial judgments concerning the content of the feature articles or news gathering practices.[13] If consideration were shown to be paid directly in exchange for publication of the articles, therefore, even if the articles were somewhat more subtle in their favorable portrayal of the subject companies' securities than is the typical Stock Market Magazine feature article, we think the disclosure requirement would apply. But, if in order to determine whether consideration was paid, and thus must be disclosed, the court first had to examine the free text and determine how substantially the text contributed to the final published product, both it and the SEC would inevitably and impermissibly be drawn into the arena encompassing content regulation.

To be sure, the government seeks, by disclosure, to add, not detract, from the information available to the public, but unlike designating the Canadian films as political propaganda pursuant to congressional direction as permitted by *Meese v. Keene*, 107 S. Ct. 1862 (1987),[14]

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corporation. Even were such articles published in exchange for consideration, they very likely would not come within the ambit of 17(b)'s disclosure requirement.

[13] Similarly, in *Zweig v. Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979) and *SEC v. Blavin*, 760 F.2d 706 (6th Cir. 1985), involving journalists engaged in scalping, the burden of regulation fell not directly on the content of the publications but rather on the stock transactions engaged in by the journalist around the time of publication.

[14] The propriety of the Attorney General's determination that the films were within a regulated category of speech was not at issue. 107 S. Ct. at 1864.

forcing a magazine to label its contents as published in return for consideration received from the subject of its articles carries an inherently pejorative connotation. Indeed, such a label converts the article in the reader's mind into an advertisement and surely would sharply diminish the magazine's attractiveness and circulation. Although section 17(b)'s language is facially broad, all depends on how one defines consideration. The House Report described this section as "particularly designed to meet the evils of the 'tipster sheet' as well as articles in newspapers or periodicals that purport to give an unbiased opinion but which opinions in reality are bought and paid for." House Report at 24; *see supra* note 6. That term "bought and paid for" suggests, particularly in light of the constitutional difficulties we have described, a crisp transaction sharply distinguished from normal journalistic editing or news gathering practices. We think then that section 17(b) may not be interpreted as the SEC would wish nor may an injunction issue that reaches as widely as the SEC requests.

While section 17(b) thus cannot support a disclosure requirement premised on the receipt or use of free text, the language of the statute is sufficiently broad that we believe the district court erred in dismissing the complaint. There was some evidence in the record that consideration other than free text, including the purchase of advertising space and orders for reprints, was a *quid pro quo* (*i.e.*, a tie-in agreement) for publication of the articles that the SEC regards as deceptive. Deciding the case on motions for summary judgment, the district court never determined whether such arrangements existed. If they did exist, we have no doubt that an injunction could be fashioned to require disclosure when consideration is paid in this distinct form, without trammeling fully protected speech or interfering with editorial practices that cannot be separated therefrom.

As long as free text, however provided, is not included among the elements of consideration that must be disclosed under section 17(b), an injunction should be permissible if the SEC can establish the necessary factual predicate at trial. In light of the concerns we have outlined, such an injunction must set forth with particularity the types of consideration that must be disclosed so as to avoid improper encroachment into protected speech.

* * * *

We reverse the district court's decision granting summary judgment to the defendant, and remand the case for further proceedings consistent with this opinion to address the merits of the SEC's request for an injunction against WSPI.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 86-5646 September Term, 1988

CA 82-02000

SECURITIES & EXCHANGE COMMISSION,

Appellant

v.

WALL STREET PUBLISHING INSTITUTE, INC., d/b/a STOCK MARKET MAGAZINE

Appellee

Filed September 14, 1988, Constance Dupre, Clerk

BEFORE: Silberman and D.H. Ginsburg, Circuit Judges

O R D E R

Upon consideration of Appellee's petition for rehearing it is ORDERED, by the court, that the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPRE, CLERK

BY: _____
Robert A. Bonner
Deputy

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff	:	
v.	:	CIVIL ACTION NO. 82-2000
WALL STREET PUBLISHING INSTITUTE, INC.,	:	
Defendant	:	

ORDER

In accordance with the Memorandum Opinion entered this date in the above-captioned action, it is by the Court this 12th day of July, 1984,

ORDERED, that Defendant's Motion for Summary Judgment on all courts of the Complaint be and hereby is DENIED; and it is

FURTHER ORDERED, that Plaintiff's Motion for Summary Judgment on all counts of the Complaint be and hereby is GRANTED; and it is

FURTHER ORDERED, that Wall Street Publishing Institute, Inc., its officers, directors, agents, servants, attorneys, employees, successors and assigns, and those persons in active concert or participation with them, are permanently restrained and enjoined from making use of the mails or any means or instrumentality of interstate commerce in connection with its business as an investment adviser until Defendant has made such filings with and furnished such information to the Commission as required by Section 203 of the Investment Advisers Act of 1940 [15 U.S.C. 80-b-3] and the Rules and Regulations thereunder; and it is

FURTHER ORDERED, that Wall Street Publishing Institute, Inc., its officers, directors, agents, servants, attorneys, employees, successors and assigns, and those persons in active concert or participation with them, are permanently restrained and enjoined from, directly and indirectly,

(a) employing any device, scheme or artifice to defraud any client or prospective client;

(b) engaging in any transaction, practice or course of business which operates as a fraud or deceit upon any client or prospective client; and

(c) engaging in any act, practice or course of business which is fraudulent, deceptive, or manipulative, including but not limited to, publishing, circulating or distributing any advertisement which refers, directly or indirectly, to past specific recommendations of Defendant, its successors and assigns and those persons in active concert or participation with them,

which were or would have been profitable to any person, otherwise than in compliance with 17 CFR 275.206(4)-1(a)(2);

and it is

FURTHER ORDERED, that Wall Street Publishing Institute, Inc., its officers, agents, servants, attorneys, employees, successors and assigns, and those persons in active concert or participation with them, are permanently restrained and enjoined from directly or indirectly, by the use of the means or instrumentalities of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(a) employing any device, scheme or artifice to defraud;

(b) making any untrue statement of material fact necessary in order to make the statements made, in

the light of the circumstances under which they were made, not misleading; or

(c) engaging in acts, practices or courses of business which operate or would operate as a fraud or a deceit upon any person,

in connection with the purchase or sale of any security; and it is

FURTHER ORDERED, that Wall Street Publishing Institute, Inc., its officers, directors, agents, servants, attorneys, employees, successors and assigns, and those persons in active concert or participation with them, are permanently restrained and enjoined from making use of any means or instruments or transportation or communications in interstate commerce or by the use of the mails, publishing, giving publicity to, or circulating any notice, circular, advertisement, newspaper, article,

letter, investment service, or communications which, though not purporting to offer a security for sale, describes such security for a consideration received or to be received directly or indirectly from, an issuer, underwriter or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

s/

Aubrey E. Robinson, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff	:	
v.	:	CIVIL ACTION NO. 82-2000
WALL STREET PUBLISHING INSTITUTE, INC., d/b/a STOCK MARKET MAGAZINE	:	
Defendant	:	

Filed August 1, 1986

MEMORANDUM AND ORDER

Plaintiff, the Securities and Exchange Commission, brought this civil action against Wall Street Publishing Institute, Inc., seeking injunctions pursuant to the Investment Advisers Act. of 1940, 15 U.S.C. §§ 80b-3, 80b-c, the Securities Exchange Act of 1933, 15 U.S.C. § 78j(b), and the Securities Act of 1933, 15 U.S.C. § 77q(b). This Court, on July 12, 1984, granted Plaintiff's Motion for Summary Judgment and enjoined Defendant

from committing further violations of these securities fraud provisions in its Stock Market Magazine. SEC v. Wall Street Pub. Institute, Inc., 591 F.Supp. 1070 (D.D.C. 1984). On August 26, 1985, the Court of Appeals vacated this Court's Order of July 12, 1984, and remanded the case for further proceedings as appropriate in light of the Supreme Court's decision in Lowe v. SEC, _____ U.S. _____, 105 S. Ct. 2557 (1985).

Presently before the Court are two motions. The first is Plaintiff's Motion to Partially Reinstate Findings and Orders of Injunctions. This motion involves only the Counts of the Complaint involving the Securities Exchange Act of 1934 and the Securities Act of 1933. (The SEC does not seek reinstatement of the order of injunction entered against Defendant for violation of the Advisers Act.) The second motion is Defendant's Motion to Dismiss Complaint. Upon consideration of these

motions, the oppositions thereto, and the oral argument heard on July 24, 1986, Defendant's motion shall be granted and Plaintiff's denied.

Lowe v. SEC

Lowe v. SEC, _____ U.S. _____, 105 S. Ct. 2557 (1985), was an action brought by the SEC under the Investment Advisers Act. Defendant in that case published newsletters containing investment advice and commentary. The Court held that because the content of the newsletters was disinterested and because they were offered to the public on a regular schedule, they were bona fide within the exception in the Advisers Act for "the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation." 15 U.S.C. § 80b-2(a)(11)(D). In short, the Court held that the publisher of the newsletter was not an investment adviser.

Plaintiff in the present case argues that "the Lowe decision does not change the interpretation and regulation of fraud pursuant to the Securities Act and Exchange Act." Although Lowe dealt exclusively with the Investment Advisers Act, it is relevant to the determination of the two motions presently before the Court because it bears directly on the status of Stock Market Magazine and its publisher. Under the law as articulated by the Supreme Court, the record in this case clearly indicates that Stock Market Magazine is a bona fide publication with a general and regular circulation, and that its publisher, Defendant Wall Street Publishing Institute, Inc. is not an investment adviser. These determinations are important because (1) under section 10(b) of the Securities Exchange Act of 1934, there is no longer the requisite connection to the purchase or sale of a security to find Defendant in violation of the statute; and

(2) although criminal sanctions under Section 17(b) of the Securities Act of 1933 against Defendant may be available, the Court may not constitutionally enjoin the publication of Stock Market Magazine.

Section 10(b)

In its Order of July 12, 1984, this Court found that the conduct of Defendant occurred in connection with the purchase or sale of a security as required by Section 10(b). This determination was made because of a finding that "Defendant's false and misleading statements 'touch' securities transactions" because "[t]he information disseminated by Defendant may be expected to 'cause reasonable investors to buy or sell securities in reliance thereon.'" SEC v. Wall Street Publishing Institute, Inc., 591 F.Supp. at 1088 (quoting Superintendent of Insurance v. Banker's Life Casualty Co., 404 U.S. 6, 12 (1972); SEC v. Savoy Industries, Inc., 587 F.2d 1149, 1171 (D.C. Cir. 1978).

After Lowe, because Defendant is a bona fide publication with a general and regular circulation and is excepted from the Investment Advisers Act, this reasoning no longer applies. Stock Market Magazine's representations are not "in connection with the purchase or sale of a security" and therefore Defendant has not violated Section 10(b) of the Securities Act of 1934.

The S.E.C. has argued that Defendant has violated section 10(b) because it breached a duty to speak the full truth which arose when it undertook to supply any information. All of the cases Plaintiff cites, however, involve the parties to securities transactions. In those cases, ommitting facts can result in liability "where the defendant has revealed some relevant, material information even though he had no duty (i.e. a defendant may not deal in half-truths)." First Virginia Bankshares v. Benson, 559 F.2d 1307, 1314 (5th Cir. 1977), cert. denied, 435 U.S. 952 (1978).

None of these cases apply to the obligation of a bona fide financial publication such as Stock Market Magazine, however. Section 10(b) does not apply to Defendant in this case.

Section 17(b)

Nothing in the Supreme Court's decision in Lowe alters this Court's findings that Defendant's actions violated section 17(b) of the Securities Act of 1933, which reads:

> It shall be unlawful for any person, by the use of any means or instruments of transportation or communication in interstate commerce or by the means of the mails, to publish, give publicity to, or circulate any notice, circular, advertisement, newspaper, article, letter, investment service, or communication which, though not purporting to offer a security for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof. 15 U.S.C. 77Q(b).

The Lowe decision is significant, however,

because by designating publications such as Stock Market Magazine as bona fide publications entitled to First Amendment rights, this Court is unable to fashion a civil remedy for the violation. This Court's injunction of July 12, 1986 can no longer withstand constitutional scrutiny under the First Amendment.

Although Plaintiff claims that in seeking injunctions which track the language of the Securities Exchange Act and the Securities Act it is not seeking to enjoin the publication of Stock Market Magazine, the effect of such an Order is clearly a prior restraint which violates the First Amendment. Although the Court's Order does not forbid publication entirely, it does place qualifications on publication which, if violated, could lead to punishment for contempt. Plaintiff is correct that any punishment would be imposed on Defendant after the fact of publication, but it is the injunction itself, which threatens this

punishment before the fact of publication, which violates the First Amendment. The Supreme Court has stated:

> Only government allegations and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order."

New York Times Co. v. United States, 403 U.S. 713, 726, 727 (1971). The fraud committed by Defendant in this action does not even arguably reach this level of danger. Therefore, the injunctions sought by the SEC would be unconstitutional.

CONCLUSION

This decision clearly does not stand for the proposition that Defendant, as bona fide publication, can commit fraud at will. The SEC may still bring a criminal action against it under section 17(b) if it can show that Defendant's violations were

willful. It is only before the fact restraints on free speech that are prohibited by the First Amendment.

An appropriate Order accompanies this memorandum.

Aubrey E. Robinson, Jr.
Chief Judge

DATE: August 1, 1986

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff	:	
v.	:	Civil Action No. 82-2000
WALL STREET PUBLISHING INSTITUTE, INC., d/b/a STOCK MARKET MAGAZINE,	:	
Defendant	:	

ORDER

Upon consideration of Plaintiff's Motion to Partially Reinstate Findings and Orders of Injunctions, Defendant's Motion to Dismiss Complaint, the Oppositions thereto and the entire record in this matter, it is by the Court this 1st day of August, 1986,

ORDERED, that Defendant's Motion is GRANTED and Plaintiff's Motion is DENIED.

Aubrey E. Robinson, Jr.
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff	:	
v.	:	Civil Action No. 82-2000
WALL STREET PUBLISHING INSTITUTE,	:	
Defendant	:	

AFFIDAVIT OF BERNARD D. BROWN

My name is Bernard D. Brown. I am the Managing Editor of The Stock Market Magazine (the "Magazine").

1. I have been a professional journalist for 56 years. After graduation from Richmond Hill High School in Queens, New York, in 1927, I attended New York University in 1928 and Brooklyn Law School in 1930. I worked for the Brooklyn Daily Times from 1927 to 1937, International News

Service Service from 1939 to 1944, and the Office of War Information from 1944 to 1945. From 1951 to 1955 I was Managing Editor of National Photo Dealer Magazine; from 1956 to 1959, Associate Editor of American Aviation Publications; from 1960 to 1966, Copy Editor and Makeup Editor of the New York World-Telegram and Sun; and free-lanced during 1967 and 1968. I served as Associate Editor of Financial World from 1969 to 1973, and Senior Editor, Research Institute of America, from 1973 to 1974. From 1974 to the present I have been employed by The Stock Market Magazine. I have been Managing Editor of The Stock Market Magazine for nine years.

2. By delegation from Angelo Martinelli, Publisher of The Stock Market Magazine, I have full control of all of the content appearing in the Magazine. I decide what is to appear in the Magazine, where it is to appear, and do all of the editing of content of the Magazine. I, myself, also write a substantial portion of what appears in the

Magazine. I am the sole full-time employee of the Magazine. All of the remaining individuals appearing on the masthead are either contributors of articles to the Magazine, or part-time help.

3. The Magazine is published ten times per year. Its annual subscription price is $15. Its total circulation is approximately 20,000 at present, of which close to 13,000 represent paid subscribers and the balance newsstand sales. The Magazine is sold to subscribers all over the world and over newsstands nationally.

4. The content of the Magazine is basically divided (on the masthead of the Magazine) into two kinds of articles: Departments and Features. Departments are articles which appear monthly, generally under the same title and by the same author. Features are specially written articles dealing in greater detail with a single subject. This division I will refer to as the Masthead Division. My responsibility as Managing Editor

extends to acceptance or rejection of both Departments and Features, and the editing of both forms of articles.

5. The articles in the Magazine are divided in another way -- by content: a major segment of the articles deals with broad news and comment of general interest to the business and financial community. Other articles deal with individual companies, their operations, management and record. For convenience and accuracy I will henceforth refer to the first category of articles as "general news and commentary articles," and to the second category of articles as "company" articles. Practically all of the company articles are listed and appear on the Table of Contents as "features." For all purposes relevant to this lawsuit, the division of the Magazine's content into the segments described in this paragraph are of far greater significance than the masthead designations.

6. My criteria in selecting both general news and commentary features as well as company articles are their newsworthiness. I have been so instructed

by the Publisher, and have made the selection of both kinds of articles (described in the immediately preceding paragraph) on this basis.

7. In the business and financial press, "newsworthiness" takes on a unique aspect. The activities of American companies are so varied that ordinary delineating of what they do would attract solely the limited audience of those connected with the field. Similarly, the pursuit of profit, and the patterns of management techniques are often identical or closely similar, imposing other limits on the newsworthiness of this aspect of business activity. But if a business develops a spectacular new product or technology, or makes significant strides in a new market, or offers the American public new services, these are qualities which contribute to newsworthiness in the business and financial press. So, too, do changes in the management, markets and success of older, traditionally accepted American businesses. These

are aspects of newsworthiness which make up, in part, the criteria by which the content of this Magazine is chosen.

As of January, 1980, I suspended publication of the "Best Picks" department, which had been published for three years, once each year, in the January issues.

8. From its inception, The Stock Market Magazine has had a special relationship with the small businessman, whether he be an investor or not. For the 22 years that the Magazine has been in existence, this special relationship has also played a part in the selection of articles appearing in it. There is a substantial difference between what the small businessman is interested in in reading a business publication and what officials (or stockholders) of a major corporation look for. Accordingly, orienting the content of both the general news and commentary articles as well as the company articles toward the small businessman has been a

major criterion in the selection of this Magazine's content.

9. As Managing Editor of the Magazine, I spend from 50% to 60% of my professional time checking the accuracy of and editing the general news and commentary articles that appear in the Magazine, and writing certain features and columns, such as Washington, Wall Street Scene, and Businessmen's Bulletin. The remaining 40% to 50% of the time is spent by me in reviewing for accuracy and in editing or rewriting, when necessary, the company articles that appear in the Magazine.

10. As Managing Editor of the Magazine over the past nine years, I am able to make a quantitative distinction with reasonable accuracy as between the pages of the Magazine made up of general news and commentary (on the one hand) and company articles (on the other). There is first, however, the question of defining each of these articles. My definition of a "general news or commentary" article

Company Articles

August 1981
- Research Cottrell (p.4)
- Bircher Corporation (p. 8)
- Rockcor Corporation (10)
- Harwyn Industries (12)
- Penny Stocks and Other Stocks Worth Watching (16)
- Market Mirror (2)
- Temp-Stik (26)
- Triboro Telephone (32)

General News and Commentary

October 1981
- Wall Street Scene (1)
- Growth of Institutional Holdings NYSE Stocks (6)
- Mobile Homes Sales Seen Heading Up (14)
- The Use of the "Put" in Option Trading (15)
- Chessie System Set New Records for Hauling Coal (18)
- Significant (dealing with diamonds) (22)
- Government, Private Industry Cooperate to Develop Hydroelectric Power in Canada (23)
- Books (28)
- Businessmen's Bulletin (30)
- Careers and Money (33)
- Washington: Potomac Undercurrent

Company Articles

October 1981
- Perry Drug Stores (4)
- AMSI (7)
- Holy Cow (10)
- G.R.I. (13)
- Shoney's
- Market Mirror 3/
- Citibank (26)

General News and Commentary

August 1982
- Wall Street Scene (1)
- Reagan Clings to Economic Theories Despite Fact that Policies Are Not Working (4)
- Technical Viewpoint (7)
- Banking at the Crossroads (8)
- The Boom in Delaware (13)
- Bureaucracy Blamed for Decline of American Industry (20)
- Considerations When Financing Co-generation Projects (22)
- Businessmen's Bulletin (26)
- Marriott Opens 400 Room Hotel in Panama (28)
- New Diamond Industry Association (29)
- Coca-Cola To Spend $50 Million on Diet Coke (29)
- Books (30)
- Careers and Money (32)
- Washington: Potomac Undercurrent (34)

Company Articles

August 1982
- Banking at the Crossroads (8) 4/
- Designatronics
- Pansophic's Success
- Statex Petroleum
- Market Mirror 5/
- Stock of the Month (33)

These issues of the Magazine have not been chosen selectively. The articles appearing in them are typical of the articles that have appeared in all of the issues of the Magazines in the nine years

of my stewardship as Managing Editor.

Moreover, I have been especially careful in designating the category to which each article belongs. Examination of each of the articles listed in "general news and commentary" category will demonstrate that none of them contain language which could rationally be deemed to constitute "touting" of a company security. In some, companies are mentioned (e.g., companies are mentioned in the August 1982 article on Delaware's boom); but these mentions are made as evidence of the general economic trend in Delaware, without which no such article would be credible. These mentions cannot be deemed "touting" in any conceivable sense of that word. The general news and commentary articles which appear in The Stock Market Magazine are basically similar to general articles found in other publications within the financial press.

11. My experience as Managing Editor of the Magazine for these past nine years has been that

from 50% to 60% of the pages of the Magazine are devoted to general news and commentary, with the remaining 40% to 50% to company articles. My experience is that approximately the same portion of my time is expended on reviewing and editing these two types of articles, viz., 50% to 60% of my time is spent on reviewing (for factual accuracy) and editing the general news and commentary articles, and writing features and columns, and the remaining time is spent reviewing and editing and company articles.

12. The origin and preparation of company articles which appear in the Magazine are as follows: It must be noted that we are now describing the 40 to 50 company articles that, on average, have appeared annually in the Magazine in the nine years during which I have served as Managing Editor. Further, the following procedure does not deal with the "general news and commentary" articles which make up at least half of the content

of the Magazine. With regard to the "company articles" --

(a) The first step is the origination of the concept of an article. Either I or a free-lance writer, or a representative of a public relations firm (that does business with all of the publications in the financial press) may develop the concept that an article dealing with a particular company is newsworthy. If a public relations firm develops the concept, it is that one of its clients is newsworthy.

(b) The second step is that this concept is communicated to me. If I have developed the concept of the article, this aspect of the second step is avoided. But no matter who develops the concept of the article (whether it be a free-lance writer, a representative of a public relations firm, or whether I develop it myself), my invariable rule is to request from the source originating the concept as much written information concerning the company as is available. If I have developed the concept,

I request this information. But in every case in which a story concept is judged by me for its newsworthiness, I receive in advance of making that judgment at least the most recent annual report of the company. Normally I also receive whatever SEC forms -- 10-K (the Company's annual report to the SEC) or 10-Q (the quarterly report) that the company has available. But, as a minimum in every case involving a decision on a company article, I receive at least the annual report of that company.

(c) The third step is that I then decide whether the article (which is still in concept form) is sufficiently newsworthy for me to make a commitment on behalf of the Magazine to publish it. My criteria for this decision are set forth above in paragraphs 7 and 8. If the concept of the article has come from a free-lance writer or from a public relations firm, that decision -- if favorable -- is transmitted to them. On numerous occasions, which in my experience have amounted to no less

than 20% of the concepts submitted to me, I have rejected the concept of the article and the matter ended there.

(d) The fourth step then involves the preparation of a draft article. The draft article is prepared either by an employee of the public relations firm (if they have such creative ability in house) or, if I am the originator of the concept, by me. If the public relations firm that suggested the concept has no such in-house capability, it has been my custom to recommend to it a free-lance writer whose reliability has been proven to me over the years. By "reliability" I mean reliability in terms of factual accuracy and professional writing ability. In isolated cases (described below in paragraph 16), the public relations firm and I have agreed that I would write the article.

Obviously a necessary part of this step is the writing of the draft article by the individual designated to do so. In other portions of this

submission, the steps taken by free-lancers and in-house employees of public relations firms to insure the factual accuracy of these drafts are discussed.

(f) The fifth step is the submission of the draft article to me. Once this is done, I perform two chores. The first is to ascertain the factual accuracy of the draft. I do so (1) by studying the financial reports already submitted to me, which invariably include the latest annual report of the company involved; I should note that I maintain a collection of no less than 500 annual reports in my office at the Magazine reflecting this practice; (2) I also check the factual accuracy of the draft by personal consultation with the officials of the company involved, doing so in a majority of the situations in which company articles are prepared; (3) I also do so by checking with the additional materials given me in the first instance, which include the SEC filings (the 10-Ks and the 10-Qs). But in the case of <u>every</u> company article that is

submitted to me, the key facts covered in the article are checked for accuracy against the company's latest annual report and, in a majority of such cases, are checked personally with company officials. Anyone experienced with such annual reports will recognize that these reports contain adequate information to insure that the basic financial and operational elements of the company (as contained in the article draft) can be verified.

(g) The sixth step is the literary (journalistic) editing of the draft, preparatory for typesetting it.

(h) The final step is typesetting the article for printing.

(i) My own activities in connection with the reviewing of each company article for accuracy and editing it involves an average of from 5 to 6 hours of my time per article. The average time involved between steps (a) and (h) described in this sub-paragraph is approximately four to six weeks.

13. I spent a substantial additional amount of my time editing those general news and commentary articles which appear in the Magazine. Still another block of my time is spent in writing, myself, those Departments and features which deal with general news and commentary, such as "Wall Street Scene" and "Washington. . . Potomac Undercurrent," which are monthly columns written by me.

14. The Magazine has a policy permitting the sale of reprints of its articles, for which it holds a copyright. In all cases, the decision by the company featured in the "company" article to purchase reprints has been made after the article had appeared, In no case has the purchase of reprints ever been made a condition of the publication of any such article.

15. The Magazine accepts advertising from companies which it has featured in "company" articles. In every such case, the solicitation of advertising has occurred after the article concerning

the company appeared in the Magazine. In no case has the purchase of advertising ever been made a condition of the publication of any article in the Magazine.

16. In certain situations I have received money from sources outside of Wall Street Publishing Institute in connection with articles that appeared in it. These situations involved nine articles of the approximately 360-450 company articles published in that period. (a) On three occasions in 1979 and 1980, the public relations firm of Porter, Levay and Rose conceived a concept for an article which that firm broached to me. I felt the concept to be newsworthy, and so informed that firm. The question was then who was to write the article. Because of special expertise held by me, it was agreed by that firm and by me that I would write that article. I felt that these duties fell outside of my responsibilities as Managing Editor of the Magazine since in each of

the three cases the editorial determination to print the article had been made weeks before the decision that I would write it. On each of these three occasions I received the amount of $250 from Porter, Levay and Rose for writing each of these articles. As I have indicated, none of this money was paid to me or received by me for placing or positioning any of these articles in The Stock Market Magazine.

(b) Similarly, on one occasion, a public relations man named Craig Wood paid me approximately that same amount long after I had informed him that his client's article was to be published and after Wood sent me a draft which was not usable. I was paid for writing that article.

During the last six years I have served as a consultant to the public relations firm headed by John Di Nigris. On many occasions, Mr. Di Nigris consulted with me to determine whether or not I felt that a particular client (which was generally a new client of his firm) was sufficiently

newsworthy to be written up in any of the financial publications, from Forbes through Business Week to The Stock Market Magazine. Mr. Di Nigris' records and my own indicate a total payment to me of $5000 over a period of six years for these services, averaging approximately $100 per consultation. My judgment was that approximately half of these companies were, in fact, newsworthy, and I so told Mr. Di Nigris. Because they were newsworthy, six of these companies then became of the subject of articles in The Stock Market Magazine; confirming my judgment, articles were also written about certain of these six companies in Financial World, Media General Financial Weekly, Computer World, ICP Software Business Review, Fortune, The New York Times, Time Magazine, People Magazine, Business Week, and the Wall Street Transcript.

I deny categorically that I received one penny from either Porter, Levay and Rose or Mr. Di Nigris, or from anyone else, for either printing or

positioning an article in The Stock Market Magazine. How and why I was paid is set forth hereinabove.

17. I have never traded in any stock mentioned in The Stock Market Magazine during my tenure as Managing Editor. I hold no stock whatever.

18. I have never published a single item in the Magazine for the purpose of affecting the value of any security.

19. I, and no one else, have always had full control over what appears in the pages of The Stock Market Magazine.

20. The company articles which appear as a portion of the Magazine are not published to influence the value of any security. No one on the Magazine has received any benefit, direct or indirect, from any fluctuation in the price of any security issued by a company featured in a company article.

I declare under penalty of perjury that the

foregoing is true and correct.

Executed on September 8, 1983.

s/

BERNARD D. BROWN

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SECURITIES AND EXCHANGE COMMISSION	:	
Plaintiff	:	
v.	:	Civil Action No. 82-2000
WALL STREET PUBLISHING INSTITUTE, INC.,	:	
Defendant	:	

AFFIDAVIT OF ANGELO MARTINELLI

My name is Angelo Martinelli. I am the sole owner of Wall Street Publishing Institute, Inc., the publisher of The Stock Market Magazine (the "Magazine"). I publish several other publications at the plant at 16 School Street, Yonkers, New York. In addition, I own the Gazette Press, located at that address. I also serve as Mayor of Yonkers.

1. The Stock Market Magazine has been published for over 22 years. I have been publisher of the Magazine for the last 15 years. During that entire

time it has appeared in substantially the same format, with substantially the same content. My instructions to the Managing Editor have been to write, edit and publish a business magazine of general interest to the individual who is not wealthy. My instructions have been to include within the Magazine a substantial portion of articles that bear on general financial (or business) news and commentary, in contrast to articles which deal with the operations and record of individual companies.

2. Because of my various other duties, I have spent less than 15% of my time over the years involved in the affairs of Stock Market Magazine. This small percentage of time has generally dealt with the visual and financial aspects of the Magazine, as to which I have certain expertise because I operate a professional printing business. On occasions I have also participated to a very limited extent in the promotional activities of the Magazine, scanning promotional material used by it

to solicit subscriptions and advertising. But the substance of such material has been written by others.

3. The Magazine has fluctuated substantially in its circulation over the years. Whereas it once had a circulation in excess of 40,000 copies (subscription and newsstand) it now has approximately 15,000. Of those, more than 12,000 are subscription sales, and the balance are newsstand sales. The Magazine is circulated by subscription and newsstand throughout the United States and Canada.

4. Because I own the company which publishes the Magazine, I am personally responsible for all of its fiscal matters. I write all checks and authorize all major expenditures.

5. For the past nine years I have delegated full responsibility for the editorial content of the Magazine to Bernard Brown. By "editorial content" I mean all of these articles, the checking of their accuracy, and their editing is Mr. Brown's

responsibility. So, too, is the layout of the Magazine.

6. I am aware that a portion of the "company" articles that appear as features in the Magazine originate as concepts from public relations firms. I am also aware that information dealing with these companies -- in various forms -- also comes to Mr. Brown from either the featured companies directly or from their public relations firms or from free-lance writers employed by the public relations firms. I have no direct knowledge of any financial arrangements that may exist between any of these entities.

7. Certain of the "Departments" which are published in the Magazine are written by authors whom the Magazine pays directly. I authorize checks to be written to these authors.

8. Since the Magazine owns the copyrights to all of the content that is printed within it, the Magazine holds the reprint rights to this content.

The Magazine often sells these reprints on the request of the companies which are featured. But it is the policy of the Magazine that such sales are never conditioned on the printing of the article. Decisions to purchase reprints are invariably made after the article has appeared in the Magazine.

9. Similarly, the Magazine accepts advertising from companies which are featured in the Magazine. Acceptance of such advertising, however, is never a condition imposed by the Magazine for the printing of a feature article concerning that company.

10. All of the editorial policies of the Magazine are in Mr. Brown's hands. He has, however, been effective in creating and circulating a Magazine which has broadly based fare, as I instructed. This fare includes general business news and commentary, which is what I intended this Magazine to contain in substantial volume.

11. I am also aware of the fact that in the field of financial publications there are publications known as "touting" publications, which make direct recommendations concerning the purchase and sale of securities. I believe that the content of the Magazine itself will indicate that there is substantial distinction between the "company" articles published by it and the recommendations published by the "touting" publications. Certainly, the subscription rate of the Magazine ($15 per year) is a fraction of the subscription rate of these "touting" sheets. That is because the Magazine performs, and is intended to perform, a different function.

12. As the financial figures filed by the Magazine in this case have indicated, the Magazine has never made a substantial profit. In two of the past five years it has lost money. It is kept in publication because it is my conviction that at some time in the future it will become profitable.

13. At some time in 1980 the Magazine for the first time received correspondence from the SEC regarding problems that the SEC had with the Magazine. Later, it is my understanding that an investigation was commenced by that agency of the Magazine. I appeared to offer sworn testimony, as did Mr. Brown and others. During this period it was my position to try and find from the SEC if any modifications of the format or content of the Magazine was required in order to satisfy the agency's concerns. I was unsuccessful in this effort. No such guidance was given to me, or to my son, the Magazine's attorney, except the requirement to register as an Investment Adviser. This, on consultation with counsel, I declined to do because it was and is my position that the Magazine falls within an exclusion to the registration law.

14. At no time during my ownership of the Magazine have I (or the company, WSPI) ever received compensation of any kind for publishing or

positioning an article in the Magazine.

15. At no time during my ownership of the Magazine was any article published for the purpose of affecting the value of any security of any company mentioned in the Magazine. Neither I nor the Company has any connection whatever with any company featured in the Magazine.

16. At no time during my ownership of the Magazine have I owned or traded in any security of any company written about in the Magazine.

17. It is my understanding that Mr. Brown independently checks the factual accuracy of all salient facts that appear in the Magazine concerning companies featured in "company" articles, and does so by consultation with published annual reports and direct communication with company officials. This is in accord with company policy.

18. I am aware that on isolated occasions during the past nine years, Mr. Brown has received compensation from entities other than WSPI for

writing an article (after an earlier decision was made by him that the article was newsworthy). It is my understanding that the decision to publish was made without any consideration of such compensation. I also understand that Mr. Brown has also on isolated occasions received compensation from a single public relations firm for consultation on the general newsworthiness of companies represented by that firm, and that subsequently an article appeared in the Magazine featuring such companies. My understanding is that over a period of nine years no more than nine occasions are involved in the events described in this paragraph. It is not clear to me at all that the editorial independence of Mr. Brown was compromised in either case because the Magazine's determination to publish appears to have been made without regard to compensation. Nor is it at all clear that these incidents made up any kind of continued practice. But to avoid any question of this recurring, Mr. Brown has been instructed that

he is to receive compensation from no one other than WSPI for materials appearing in the Magazine, and he has agreed.

19. Certain changes were made in the Masthead of the Magazine as of March of 1982. These changes were made to (1) make it clear to the public that the original drafts and informational material that come to the Magazine may come from featured companies or their public relations firms, or from free-lancers paid by the companies or their representatives. Given Mr. Brown's function of independent checking of all such materials, I felt that this disclosure was proper but did not constitute departure from ethical standards within the financial or business press. (2) Second, since Mr. Brown is the sole full-time employee, I felt it necessary to indicate the limitations of staff and that the independent checking of accuracy of materials in the Magazine could not be warranted because all such information came from third party sources outside the Magazine (either through

published financial reports or conversations with company officials). (3) Finally, "contributing editors" and others who contributed efforts based on part-time activity were eliminated so as to avoid any possibility of confusion on this score.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 24, 1983.

/s/
Angelo Martinelli

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Securities and Exchange Commission,	:	
Plaintiff	:	
v.	:	Civil Action No. 82-2000
WALL STREET PUBLISHING INSTITUTE, INC.,	:	
Defendant	:	

AFFIDAVIT
OF
TIMOTHY B. BLODGETT

My name is Timothy B. Blodgett. I am Senior Editor, Editorial Operations, of the Harvard Business Review. The Harvard Business Review is the professional publication published by the Harvard Business School.

1. I have been professionally involved with the business and financial press for the past 22 years. My posts and involvement during that period were as follows:

(a) From 1961 to 1964 I worked as a business reporter for the Minneapolis Star and Minneapolis Tribune. During this period I kept aware of all financial publications as they affected the Twin Cities area. My beat was devoted to aspects of the financial market as they affected the local and regional economy. Approximately half of my professional activity during this period dealt with information relevant to investments.

(b) From 1964 through 1966 I was the Business Editor of the Minneapolis Tribune. I supervised the activities of three other financial reporters. I paid particular attention to the financial press during this period because I had the responsibility for maintaining the newspaper's competitive standing on financial reporting. During this period I served as President of the Twin Cities Newspaper Guild; I became a member of the Society of American Business Writers (the association of

professional business writers); one of my business series was awarded the Twin Cities Newspaper Guild award. In the course of my activities in this position I regularly read Forbes and Fortune, and read with less regularity but with considerable frequency Barron's. This activity was required in order to maintain familiarity with the content of the financial press, an integral component of my job.

(c) (i) In 1966 I joined the staff of the Harvard Business Review as an Associate Editor. I was assigned to cover the financial area of management activities for the Harvard Business School ("HBS"). Although the Harvard Business Business Review ("HBR") has more of a management focus, it was important for me in this position to remain aware of how the securities market worked. This was particularly important in that portion of my work that involved the development of articles

for preparation by others for HBR. I therefore followed carefully the publications noted above, and read (with less regularity) the Wall Street Transcript. In addition, in this job, my principal fare was the daily reading and digestion of the Wall Street Journal and the financial section of the New York Times. Because of the nature of my work for HBR during this period, my time was divided into two segments; 75% of my time was spent in dealing with corporate finance.

(ii) From 1973 through 1981 I held the post of Senior Editor of HBR, covering the finance area. I continued to have ultimate responsibility for the articles of the HBS dealing with all aspects of the financial market.

(iii) In 1981 I became Senior Editor, Editorial Operations, of the Harvard Business Review. I took on supervisory functions having to do with maintenance of the high level of

professional editorial competence for which the HBS is known in the business and financial press. I retained some responsibility, however, for the development of articles dealing with the financial area.

(iv) Because of those activities over the past 22 years, I am able to form opinions dealing with the customs, practices and professional rules in use in the business and financial press.

2. The term "business and financial press," as I use it in this affidavit, includes the Wall Street Journal, the financial section of the New York Times, Business Week, Fortune, Forbes, Barron's, and all other magazines which deal primarily with business and financial matters. It includes The Stock Market Magazine, which fits within that definition.

3. I am informed that a provision of law relevant to this case reads as follows, excluding

the following from the requirement

> ". . .the publisher of any bona fide newspaper, news magazine or business or financial publication of general or regular circulation."

The purpose of this affidavit is to state certain rules which bear on whether The Stock Market Magazine fits within this definition. But I am also aware that it has few, if any, guidelines in the law as to what is "bona fide," and what is a "business or financial publication," of what is "general or regular circulation." As to these points, opinions based on 22 years devoted to the content, practice and professional rules which pertain to the business and financial press may properly be useful in formulating these definitions and applying them to The Stock Market Magazine.

4. I have read sixteen issues of The Stock Market Magazine, drawn at random. I have also read the affidavits of Bernard Brown, Angelo Martinelli, Edward Gottlieb, and the pleadings in

this case.

5. The basic task in determining whether a particular publication falls within the definition set forth above (or outside it) begins with the criteria to be used. This affidavit will outline each such criterion as it is employed.

6. The first relevant criterion relevant in determining whether a particular publication is a "bona fide business or financial publication" is the percentage of general news and commentary that appears in the particular publication. In my examination of the issues of The Stock Market Magazine I find that the percentage of pages devoted to general news and commentary (as apart from discussion of particular companies, their operations and their securities) is 50.44%. I have attached my detailed computation of these pages as Exhibit A, which I hereby incorporate within this affidavit.

In my opinion, a publication that devotes that percentage of its content to general news and commentary qualifies as a bona fide business or financial publication. There are no hard and fast rules as to the precise percentage that marks the edge of this definition. But I see no way that the percentage of general news and commentary that appears in The Stock Market Magazine can be characterized as anything but the content of a bona fide business or financial publication. This is intrinsically so with regard to the content of The Stock Market Magazine itself. It is also true when that percentage is compared with the percentage of general news and comment contained in other publications whose status as "bona fide business or financial publications" (i.e., Forbes and Financial World) has never been disputed.[1/]

[1/] My Exhibit B calculations disclose that Financial World devotes 11.8% of its pages to general news and commentary and 88.2% of its pages to "company" articles. Forbes devotes 51.6% of its pages to general news and commentary and 48.3% of its pages to "company" articles.

I have attached my calculation of pages devoted to general news and commentary in these publications in contrast to company articles as Exhibit B, which I hereby incorporate within this affidavit.

7. My definition of the phrase "general news and commentary" in the preceding paragraph is limited to articles which do not deal with the record, management or stock value of individual companies, but rather to general news regarding economic and financial trends, other forms of articles (of the same general nature, unrelated to particular companies) and commentary on business or economic matters.

8. A second criterion relevant in determining whether a particular publication is a "bona fide business or financial publication" is the basis on which articles are selected. According to Mr. Brown's affidavit, the basis for his selection of articles is their newsworthiness. While a certain ingredient of "newsworthiness" has to do with the

article's relation in time to recent events, that is not the sole determinant. An article is "newsworthy" if it has news value to the readers of the publication. Not only are the general news and commentary articles in The Stock Market Magazine newsworthy by this test, but a substantial portion of the "company" articles (using the description of such articles in contrast to general news and commentary that Mr. Brown uses in his affidavit) is newsworthy. In my examination of the content of the articles in The Stock Market Magazine, I find no basis for any determination that the articles printed in it are selected on any basis excepting that of the newsworthiness of the subject.

9. A third criterion to be used in the determination is whether the format and content of the Magazine are determined independently by the professional journalists who make up the Magazine and edit it. I have read Mr. Brown's affidavit

concerning the operation of The Stock Market Magazine. I am aware that public relations firms with great frequency are the originators of article concepts that result in articles which appear in The Stock Market Magazine. I am also aware that preparation of the fact kits and draft articles submitted to the Magazine are, in such cases, paid for by the featured companies (or their public relations firm). But it is clear to me that Mr. Brown retains the sole power to determine the editorial content of the Magazine, and that Brown independently checks each such article for accuracy and edits it. Under these circumstances, the role and function of the public relations firms do not vitiate my determination that The Stock Market Magazine is a "bona fide business or financial publication."

10. I am also aware that the practice in developing an article from concept to final article differs in The Stock Market Magazine from the

procedure in other, larger financial publications. The major difference is that the larger publications assign a reporter or editor to draft an article based on interviews and material furnished by a public relations firm, while this is not done by The Stock Market Magazine, which, for reasons having largely to do with a shortage of working capital (I am informed) relies solely on Mr. Brown's services. If, however, Mr. Brown has the final word on what appears in The Stock Market Magazine, and if he independently checks the accuracy of the company articles that appear in it, I do not find that this distinction in procedures is a significant element of "bad faith" on the part of The Stock Market Magazine. What ultimately appears in the pages of a magazine is the ultimate determinant of its independence and objectivity. That is the function and province of the editors of the magazine. In the final analysis, the content, the source, and the procedure by which earlier drafts

reach the editor of a financial publication are not the determinants of whether that publication meets bona fide journalistic standards. What finally appears in its pages is. Thus, on this score, my conclusion regarding The Stock Market Magazine is not affected.

11. I am also aware that The Stock Market Magazine offers reprints of company articles published in it, and secures advertisements from companies which are featured in its articles. But the Brown affidavit makes it clear that neither the sale of reprints nor the securing of ads is ever a condition on the acceptance of an article in The Stock Market Magazine, nor its positioning in any way. Accordingly, these facts do not vitiate my conclusion that the Magazine is a bona fide business or financial publication.

12. I am further aware that on nine occasions over nine years, Mr. Brown has accepted funds from sources other than the publisher of the Magazine,

either for writing an article (the concept of which had earlier been accepted for publication by Mr. Brown) or for consulting with a public relations firm regarding the newsworthiness of certain companies which later appeared as the subject of features in The Stock Market Magazine. While these events could influence the editorial independence of the Magazine, the fact is that they are isolated and of dubious connection in evaluating the newsworthiness of what actually appeared in The Stock Market Magazine. The test is whether there existed a persistent practice by which Mr. Brown departed from his true professional role as Managing Editor and compromised his editorial independence by these events. Notwithstanding what I said at the outset of this paragraph, I find no such practice.

13. I have read the affidavits of both Mr. Brown and Mr. Martinelli. They state that neither has ever traded in securities featured in the Magazine, that the Magazine has never published an

article to influence the value of any security (since neither the publisher nor Mr. Brown has any connection with any of the featured companies), nor has any article been positioned or published for any financial gain to the publisher (nor to Mr. Brown, excepting in the situation described in paragraph 11 of this affidavit, which I do not believe reflects the practices or policies of the Magazine). Put most simply and in obvious terms, it is quite clear that Mr. Martinelli utilizes materials submitted from public relations firms without any regard to influencing the value of securities, but because he wishes to save on overhead. He has but one employee, Mr. Brown, and this rather than any other motivation is the reason he uses information provided by these public relations firms. All of these factors are additional criteria that corroborate my opinion that The Stock Market Magazine is a "bona fide business or financial publication."

14. The circulation figures that appear in Mr. Brown's affidavit indicate that the Magazine has both a regular and general circulation.

15. It is important to note a distinction between the amount of detail concerning companies found in The Stock Market Magazine's "company" articles and the amount of detail found in other, larger publications in the financial press. The detail printed in The Stock Market Magazine is exceedingly sparse compared with that found in "company articles" in Business Week or in Forbes, or in Financial World. This distinction in the amount of detail provided goes to a significant point. While the reasonable investor might well be moved to buy or sell a security on the basis of the full facts found in the larger publications, the reaction of the reasonably prudent potential investor to what is provided in The Stock Market Magazine would be to seek the kind of additional

information that the larger magazines provide but The Stock Market Magazine does not. What is, and what is not a "recommendation" to buy or sell securities, in considering the reaction of the average reader, will turn on this point.

16. I find that the distinction made in the pleadings in this case that The Stock Market Magazine generally prints "favorable" articles while other publications (ostensibly not required to register under the law) do not, to be meaningless. A negative or unfavorable "company" article is as much a recommendation to sell as a favorable article is a recommendation to buy.

17. I have read the letter of June 11, 1980 from Michael Berenson to Mr. Brown, stating that the exclusion of a "bona fide business or financial publication" was to be denied The Stock Market Magazine because the exclusion is restricted to publications

"whose primary appeal is to persons engaged in business or finance rather than investors as such."

To a professional journalist who has spent 22 years of intimate activity with the financial press, such a distinction defies the reality of the business and financial world. The plain reason is that whereas there may be individuals (or institutions) who read financial publications for reasons other than for investment information, these readers invariably also read such publications for information relevant to investments. There is no study anywhere, nor is one possible, that could draw the distinction made by the letter of June 11, 1980, and find it reflected by the facts of life within the readership of financial and business publications. In isolated cases there may be a reader of the financial and business press utterly uninterested in investment information. But the vast bulk of all readers of the entire financial press do so for

a variety of reasons -- investment information is invariably one such reason -- and divining the motivation of such individuals in their daily reading habits is a chore for behavioral scientists rather than for students of the financial press. No such studies bearing on this motivation have ever been made, to my knowledge.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 22, 1983.

S/

TIMOTHY B. BLODGETT

EXHIBIT A

THE STOCK MARKET MAGAZINE

Issue	Pages Devoted to General News and Commentary	Pages Devoted to General News and Commentary
September 1977	13	14-1/2
June 1978	9-1/2	11
October 1978	14-1/2	13
July-August 1979	12	14-1/2
May-June 1980	19	16
December 1980	12-1/2	16
August 1981	12-1/2	14
September 1981	14	12
October 1981	11	14-1/2
August 1982	16-1/2	10-1/2
September 1982	7-1/2	22-1/2
December 1982	10-1/2	16
January 1983	17-1/2	8-1/2
February 1983	24-1/2	8
March 1983	12-1/2	13
April 1983	20	9
Totals	227	223
Percentage	50.44%	49.5%

EXHIBIT B

Issue	Pages Devoted to General News and Commentary	Pages Devoted to "Company" Articles
Financial World		
January 31, 1983	15-1/2	47
February 28, 1983	3-1/2	40-1/2
March 15, 1983	4	61-1/2
April 15, 1983	4	53
Total	27	202
Percentage	11.8%	88.2%
Forbes		
February 14, 1983	45	39
February 28, 1983	39	35
March 14, 1983	39	49
April 15, 1983	46-1/2	36
Total	170	159
Percentage	51.7%	48.3%